PRINCIPLES AND PRECEDENTS

OF

Moohummudan Law,

BEING

A COMPILATION OF PRIMARY RULES RELATIVE TO THE DOCTRINE OF INHERITANCE (INCLUDING THE TENETS OF THE *SCHIA* SECTARIES), CONTRACTS AND MISCELLANEOUS SUBJECTS;

AND

A SELECTION OF LEGAL OPINIONS INVOLVING THOSE POINTS, DELIVERED IN THE SEVERAL COURTS OF JUDICATURE SUBORDINATE TO THE PRESIDENCY OF FORT WILLIAM;

TOGETHER WITH

NOTES ILLUSTRATIVE AND EXPLANATORY,

AND

PRELIMINARY REMARKS.

BY

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CALCUTTA:
1825.

SECOND EDITION.

With additional Notes, and an Appendix containing Questions for Students and an Alphabetical Digest of principles of decisions on the law and customs, relating to Moohummudans, by the Privy Council and Supreme and Sudder Courts of Madras, Calcutta, Bombay and the North Western Provinces, from 1793 to 18‿9, selected from the latest published Reports.

BY

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PREFACE

TO THE

SECOND EDITION.

No Work was ever ushered into existence with greater diffidence than the Principles and Precedents by Sir William Macnaghten. The author could scarcely have anticipated when presenting it to the Judicial Service, that almost from the very day of its publication, it would have been considered the safest guide in the administration of Mahomedan Law, and an unindisputable authority both by the Crown and Mofussil Courts. The accuracy of its doctrines has been established by the concurrent testimony of innumerable Futwas, delivered by Moofties and Cauzies, whose lives had been exclusively devoted to the study of this particular Law; and such has been the success attending the production, that after a test of years, before every Court in India, as well as before Her Majesty's Privy Council, not a single principle has ever been questioned, nor a single conclusion over-ruled.

Notwithstanding the value and utility of this work it has become extremely scarce. Apology is therefore unnecessary for placing a new Edition within the reach of the Bench, the Bar, and the Student.

It is to be feared that in Madras the Mahomedan Civil Law has not been cultivated with the same degree of attention as in Bengal and the North West. This is probably owing to the few cases connected with it which occur, and to the facility of obtaining Futwas from the Law Officers attached to the Session Courts. A knowledge of this branch of law, is, however, as necessary to all concerned in the administration of Civil Justice, in Southern India, as a knowledge of any other; for notwithstanding the means at hand of obtaining an exposition, neither an Advocate nor a Judge can do justice to a case, unless he be thoroughly acquainted with the principles on which the decision ought to be based. The time moreover is fast approaching when the means of obtaining assistance for determining what the law is, may be either totally withdrawn or confined to the Presidency Courts. On the promulgation of the contemplated Criminal Code, the office of Moofty Sudder Ameen, to which the exposition of this law is at present entrusted, will in all probability be abolished; and in this event, it may be anticipated, that Mahomedans, capable of deriving instruction from original sources, may, through want of inducement to prosecute the study, divert their attention to more remunerative pursuits. The possibility of such an occurrence will perhaps have the effect of directing greater attention to this branch of law, and may render it expedient to demand

a greater degree of knowledge of its doctrines, than has hitherto been required of Candidates for Judicial diplomas.

The principles of the Mahomedan law being fixed and intimately blended with the religion* of the people, uncertainty can only arise from erroneous application; and as any interference with, or wrong application of the law, is likely to be considered an outrage on the Mahomedan religion itself, nothing further need be said to show, how indispensable is an accurate knowledge of the principles to all concerned in the administration of justice in India. Although in the Madras Presidency, public Officers are not often required to enforce the provisions of this law, yet as they are bound to do so when called upon, it is impossible to foresee the mischievous consequences which may ensue, should a decision be passed calculated to excite the religious jealousy of the Mahomedan population.

The works on Mahomedan Law accessible to the English Student, although not very numerous, are sufficient to impart sufficient knowledge for all practical purposes. If a few more standard Arabic authorities were translated, perhaps the Bench and the Profession might have at command, sufficient means of satisfactorily dealing with intricate questions, should the contingency adverted to occur, and the construction of the law, according to their own judgment, become a matter of necessity.

A brief notice of English Books on the subject may prove of use to those who are about to commence the study.

As an authority and a Text Book, MACNAGHTEN's Principles stand foremost and will never be surpassed. So valuable is this work that two attempts have been made to supply the demand for it. A useful Manual founded on the Principles, and enriched with Extracts from ELBERLING on Inheritance, &c., was published in 1857, by Mr. SADOGOPAH CHARLOO, of the Madras Sudder Bar: and a re-print by Professor WILSON, of the Principles, without the Precedents, appeared at the commencement of this year.

MR. BAILLIE's Law of Inheritance is a valuable Treatise, but is not easily procurable in India. It is based on the original text of the Sirrajeyyah and its Commentary, the Surruffeea, Standard Arabic Works on the Soonee System of Inheritance. Abridged Translations of these Books, as well as a Translation of the Bigyato'l-bahith, a Law Tract on Inheritance in verse, are to be found among the works of Sir WILLIAM JONES. The whole doctrine of inheritance appears to be chiefly based on the Sirrajeyyah and its commentaries, and Sir WILLIAM in his Preface† says, "I am strongly disposed to believe that no possible question could occur on the Mahomedan law of succession, which might not be correctly and rapidly answered by the help of this work" (the Sirrajeyyah.)

The Law of Sale by Mr. BAILLIE, was prepared from the Futawa Aulumgiri. He describes it as a "faithful transcript" of the original, but perhaps it may

* Hamilton's Preliminary Discourse, p. XXXI.

† Complete Works, p. 204, Vol. 8, Ed. 1807.

be regretted that gentleman did not adopt the course, which seems to have suggested itself to him, of endeavouring to render the book "more readable" by re-casting the materials.

ELBERLING's Treatise on Inheritance, Gift, Will, Sale and Mortgage, contains a Compendium of the Mahomedan Law on those subjects, and as it likewise treats of the Hindu Law, it is a highly useful hand-book of reference. Having had the advantage of the labors of MACNAGHTEN and BAILLIE, the author has succeeded in rendering the Chapter on Inheritance, more intelligible to the Student, than either of those writers.

The Hedaya or Guide, a Commentary on the Mussulmaun Laws, Civil and Criminal, is the sheet anchor of the Mahomedan Lawyer. It contains a faithful representation of the doctrines of ABU HANIFAH, and his disciples ABU YUSUF and the IMAM MAHOMED ; and to use the words of a Mahomedan Author, "it has been declared like the Koran, to have superseded all previous books "on the law."*

This work was translated by Mr. HAMILTON under the auspices of the celebrated WARREN HASTINGS, than whom, no Governor ever displayed a more laudable desire to place within the reach of the Service the means of becoming acquainted with the laws of the country. The translation is contained in four thick quarto volumes, but is rarely to be met with, except in the Libraries of a few Courts.

The above are the only English authorities in use and all relate to the Soonee Civil Law prevalent in India. A general digest of the Imamiyah or Shia law, was compiled under the superintendence of Sir WILLIAM JONES. The first part of this work was translated by Captain, afterwards Colonel BAILLIE, who unfortunately left the remainder unfinished. This fragment (which also has become scarce), and a few casual notices in other works, afford the only means within the reach of the English Student, of forming an acquaintance with the Shia Civil Law, which the Courts are bound to administer when litigants of that sect come before them.† It is therefore scarcely possible that the Shia law can be well understood, at least, in the Madras Presidency. Its cultivation moreover has received no encouragement, the Court of Foujdarree Udalut having declared, that the circumstance of "Candidates for employ being of the Shea sect, will constitute an insuperable objection to their appointment to the office of Moofty Sudr Ameen."‡

The Student in the course of his reading will find frequent allusions, to the Fatawa Kazi Khan and the Fatawa Alamgiri. The former has never been translated, and a portion only of the latter was rendered into English by BAILLIE in his Law of Sale. The Fatawa Kazi Khan is reckoned to be of equal autho-

* Morley's Administration of Justice in British India, p. 289.

† 2, Moore's Indian Appeals, p. 441.

‡ Freere's Circular Letters, Madras p. 157.

rity with the Hedaya: and it was a question when WARREN HASTINGS resolved on a translation of a standard work, whether the Fatawa Alamgiri, or the Hedaya should be selected.* MORLEY describes it as a bare recital of Law Cases without arguments or proofs; but as the Hedaya contains the arguments, it may perhaps be considered a fit companion to that work. Should it ever be resolved to place at the disposal of the Service, translations or compilations from any other Arabic authorities, it may probably be found that none are so deserving of preference as these collections.

The British Indian Legislature has ever scrupulously endeavoured to avoid interference with the religious prejudices or institutions of their native subjects, and in Clause 1, Sec. XVI. Reg. III. of 1802 (Madras Code), provided that the Mahomedan Laws shall, where Mahomedans are concerned, govern suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions. In only one single particular, legislative interference with respect to inheritance and succession has taken place, viz., in the case of apostacy or change of religion. MACNAGHTEN says, (p. 1, par. 6) "difference of religion" excludes from inheritance; and BAILLIE (Inh. pp. 24, 25), that "difference of religion is such an impediment to inheritance, that an infidel cannot, in any case, be heir to a believer, nor a believer to an infidel." "Apostates are declared to be incapable of inheriting to any one, even to apostates like themselves; partly as a punishment for their guilt, in abandoning the faith; and also, because they are not considered to be of any religion, the law refusing to acknowledge them as belonging even to that to which they have apostatized." But the Legislature in Act XXI. of 1850 ruled, that, "so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his, or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in Courts established by Royal Charter within the said Territories."

Adherence to the Mahomedan Law of Procedure, Slavery or Contracts, never having been guaranteed, interference therewith on the ground of public policy is open to Government, and is not likely to attract more than ordinary attention. Act V. of 1843, which abolished slavery was allowed to pass without a murmur. It declares invalid all rights arising out of an alleged property in the person or services of another as a slave, and places slaves and freemen on the same footing as respects property and rights.

Some difference of opinion appears to have existed in the Bengal Courts regarding the application of the Mahomedan Law of Limitation, to cases of preemption, but Act XIV. of 1859, the present Indian Statute of Limitation, has placed the subject on an intelligible basis.

Contracts not having been specified in Clause I. Section XVI. Reg. III. of

* Hamilton's Preliminary Discourse to the Hedaya, p. XLIV.

1802, suits connected with the subject have been occasionally treated by the Mofussil Courts in an unsatisfactory manner, decisions having been passed, sometimes, in accordance with the Hindu or Mahomedan Law; sometimes, according to custom; sometimes, according to principles of European laws; and sometimes, according to the rule of justice, equity and good conscience. With respect to the application of the Hindu Law of Contracts, Mr. Justice STRANGE, of the Madras Sudder Court, observes, at page 73 of his Manual, "wherever equity may not be imperilled, the Court would "respect this branch also of the law, as what should naturally govern "the transactions of the people with one another, and the more so as "the Supreme Courts of the Crown are enjoined to dispense it." And with respect to the application of the Mahomedan Law, Mr. BAILLIE in his Preliminary Remarks to the Law of Sale, says, "It is an admitted principle of jurisprudence, that contracts are to be construed according to the intention of the parties, except when opposed to the policy of the law of the Country. Recourse is had however to that law as the best interpreter of intention when not sufficiently expressed, because its general provisions are presumed to be in the view of the parties when they enter into a contract. This supposition could hardly be made by a judge of the Company's Courts when construing a contract between Mahomedans, and a question of some difficulty might arise, whether such a contract when ambiguous, should be equitably construed according to the *general law of the land*, or the particular law of the parties, by which alone perhaps it could be interpreted in harmony with their intentions so far as expressed." There being no recognized "*general law of the land*" respecting contracts, in contradistinction "to the particular law of the parties, the subject resolves itself into a simple question of equity, and the difficulty remains of determining the distinctive circumstances which are likely to "imperil" equity, and preclude the application of the "law of the parties." It cannot be denied that the subject of Mofussil contracts is at present in a very unsettled state. Not being so dependant on law, as "usage and convenience," the Legislature has seldom ventured to interfere. Probably a sufficient number of decisions has already been passed by the Superior Courts, to admit of the elimination of certain recognized principles, applicable to the usages of the country, which may serve as future guides for the determination of similar or analogous cases. Should an Indian Mansfield ever arise, and educe from the conflicting customs of the various classes of the inhabitants, general principles of universal application, no man could merit greater honor.

In the preparation of this Edition it was deemed advisable to omit the original Arabic Extracts, and the names of cases published in the 1st Edition. As the substance of the original is set forth in the text, it is presumed the omission will be attended with no inconvenience. In every other respect, even to the paging, the present corresponds with the first publication.

I originally intended to insert Notes of Cases decided, at the foot of each page; but as the cases proved to be very numerous; and such an arrangement would interfere with the paging, and render this Edition inconvenient as a reference to verify quotations made from the 1st Edition; and the reports of one

Presidency are not easily procurable in another, this intention was abandoned, and, in lieu, an Alphabetical Digest has been appended, of cases decided in the Superior Courts from 1793 to 1859, reference being made by number, in the body of the work, to cases contained in the Digest. In preparing the cases I availed myself of MORLEY's valuable Digest and the published Reports, and am indebted entirely to MORLEY for the cases decided in the Supreme Courts. Having failed to obtain the reports subsequent to those abstracted in the New Series brought down to 1850, the Cases decided in the Supreme Courts between that year and 1859 are omitted.* The arrangement adopted corresponds with the heading of the Principles and Precedents, and the cases have been more fully noticed than they could possibly have been within the compass of brief notes.

It will be observed that the Madras and Bombay Decisions on points of Mahomedan Law, are few, in comparison, with those of Bengal and the North Western Provinces; but as the law has been more frequently appealed to in these Presidencies, and has therefore necessarily received greater attention, and been more fully discussed by an intelligent Bar, the rulings of the Sudder Dewanny Adawlut, may, perhaps, be received as precedents of high authority in Madras and Bombay, and will undoubtedly be viewed as such in Bengal and the North West.

The Orthography of Arabic and Persian terms adopted in the several reports and other works referred to, has not been altered.

My thankful acknowledgments are due to the Judges of the Sudder Court, for their kindness in allowing me the free use of the Reports in their valuable Indian Law Library, which has enabled me to render the Digest more complete than it otherwise could have been.

W. SLOAN.

MADRAS,
May 1860.

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* NOTE.—The Privy Council Reports examined were brought down to February 1858; the decisions of the Sudder Adawlut Madras to September 1859; those of Bengal to November 1859; those of the North Western Provinces to March 1857; and those of Bombay to the end of 1857.

PRELIMINARY REMARKS.

The want of some practical information on the subject of Moohummudan Law has long been felt and acknowledged by those whose duty it is to decide matters of civil controversy agreeably to its principles. The translation of the *Hidaya*, indeed, is calculated to extend a general knowledge of that Code, but it is of little utility as a work of reference, to indicate the Law on any particular point which may be submitted to judicial decision. Questions which are likely to be litigated give place to extravagant hypotheses, the occurrence of real cases, similar to which, is beyond the verge of probability. The arrangement is immethodical; the most prolix and irrelevant discussions are introduced; every argument, however absurd, both for and against each particular tenet, is urged and combated (often with doubtful success); and the reader is frequently at a loss to determine which opinion to adopt and which to reject.

"No branch of Jurisprudence is more important than the Law of Successions or Inheritance; as it constitutes that part of any national system of laws which is the

most peculiar and distinct, and which is of most frequent use and extensive application."*

The subject unquestionably is of the greatest importance, as affecting the interests of all descriptions of people; but the *Hidaya* is entirely silent on the subject. It deserves special notice as giving rise to interminable litigation; a result attributable, more probably, to the almost universal ignorance of the people who are affected by it, than to any intricacy or obscurity of the Law itself. No English writer, that I am aware of, has treated of the Moohummudan Law of Inheritance excepting Sir William Jones, who translated the *Sirajyah*, a celebrated work on that subject; but, being a version of a scientific Arabic treatise, the style of his work is necessarily abstruse, so much so, that a knowledge of the original language is almost requisite to the study of the translation. In his abstract translation of its commentary (the *Shureefeea*) he has introduced such illustrations only as appeared to him (who was thoroughly acquainted with the text) necessary to facilitate the understanding of it. For these considerations I was induced to undertake the work which is now with diffidence submitted to the Public. Conscious of my inability to do justice to the task, I may yet venture to express a hope, that my labours may prove of some assistance to my judicial brethren, or that, at least, an abler individual may follow up with success the work which I have so imperfectly commenced. I am aware that, among other faults, I may be charged with being obscure, where I laboured at brevity, and with being tiresome, where my

* Colebrooke's Preface to the two Treatises on the Hindoo Law of Inheritance.

object was illustration. I can only say, that I have endeavoured, as much as was in my power, to avoid technicalities, and to treat the subject with all the perspicuity of which it is susceptible. I have spared myself no pains in my researches to establish the accuracy of the legal doctrines here laid down, and to those who are disposed to view with approbation any attempt, however humble, at the promotion of justice, it may perhaps seem reasonable, that the disadvantages of the author should be weighed against his imperfections. Continual want of leisure and occasional privation of health have attended me during the progress of this work. I should mention, that the compilation is (excepting the assistance derived from learned natives) entirely and exclusively my own, and that it consequently possesses no official weight whatever, and no authority, beyond that which may be ascribed to it by individual confidence. The brief disquisition on the Moohummudan Law, which I have here ventured to introduce, may not be matter of much utility; but I was amused by the analogy occasionally observable between this and other Codes of Jurisprudence, and it appeared to me, that by recording such observations as my limited knowledge suggested, I might be the means of attracting the attention of others to the genius of the Law in question.

The provisions of the Moohummudan Law of Inheritance have for their basis the following passages of the Koran; "God hath thus commanded you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two third parts of what the deceased shall leave; and if there be but one, she shall have

the half: and the parents of the deceased shall have each of them a sixth part of what he shall leave if he have a child; but if he have no child, and his parents be his heirs, then his mother shall have the third part: and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath and his debts be paid. *Ye know not whether your parents or your children be of greater use unto you.* This is an ordinance from God, and God is knowing and wise. Moreover ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts be paid: they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid: and if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate, but if there be more than this number, they shall all be equal sharers in the third part, after payment of the legacies which shall be bequeathed and the debts, without prejudice to the heirs."* "They will consult thee for thy decision in certain cases: say unto them, God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave; and he shall be heir to her, in case she have no issue, but if there be two sisters, they shall have, between them, two third

* Sale's Koran, pages 94 and 95, vol. 1.

parts of what he shall leave: and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."* In these provisions we find ample attention paid to the interests of all those whom nature places in the first rank of our affections; and indeed it is difficult to conceive any system containing rules more strictly just and equitable. The obvious principle of preferring the nearer kindred to claimants whose relation to the deceased is not so proximate, seems to have been adopted as the invariable standard for fixing the proportions; and the rules for the succession of the several heirs, and the order of preference assigned to the different degrees of consanguinity, seem to be exactly what would be most consonant to the general inclination of mankind. The Mosaic Law on the subject of Inheritance is more brief and less comprehensive: "And thou shalt speak unto the children of Israel, saying, if a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter; and if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren, then ye shall give his inheritane unto his father's brethren: and if his father have no brethren, then shall ye give his inheritance unto his kinsman that is next to him of his family, and he shall possess it."† Here we find no provision whatever made for the parents, although there are certainly other obvious reasons besides that adduced in the emphatic language of the Koran, why they should not be excluded. "Upon failure of issue in the first and the other descending degrees, reason sug-

* Sale's Koran, page 127.

† Numbers, chap. 27.

gested that inheritance ought to turn back into the line of ascendants; as well in consideration that, for the most part, either the possessions themselves, or at least the first seeds and principles of them, which the children afterwards increased, proceed from the parents, as because their extraordinary benefits give them an especial title to this reward: who, since they would much rather have desired, *that their children should inherit their fortunes*, yet when they survived them, contrary to the course of nature, it was but equitable they should receive (however melancholy) this comfort of succeeding to what the children possessed. *It is a condition* (as Pliny observes) *abundantly unhappy for a father to be sole heir of his own son.*"*

* Puffendorf on the Law of Nature and Nations, book IV, chap. ix, § 13, and see continuation of the argument. The same learned author cites the following argument, as having been adduced to prove that the rights of the parents were not overlooked by the Jewish Law; but he does not seem to attach much weight thereto, and it is sufficient, for my purpose, that the Law in question contains no express provision for the parents. In truth, the argument advanced seems rather jesuitical: "Philo the Jew reporting that Moses established this order of inheritance, that the sons should stand first, the daughters next, then the brothers, and in the fourth place the uncles by the father's side, used this as an argument to prove that fathers likewise may inherit what their sons leave behind; for it would be useless (says he) to imagine that the uncle should be allowed to succeed his brother's son, as a near kinsman to the father, and yet the father himself be abridged of that privilege; but inasmuch as the law of nature appoints that children should be heirs to their parents, and not parents to their children, Moses passed this case over in silence, as ominous and unlucky, and contrary to all pious wishes and desires; lest the father and mother should seem to be gainers by the immature death of their children, who ought to be afflicted with most inexpressible grief. Yet by allowing the right of inheritance to the uncles, he obliquely admits the claim of the parents, both for the preservation of decency and order, and for continuing the estate in the same family."

Accordingly we find that the Civil Law expressly enumerates the parents among heirs.

In the English law of successions to the personal property of intestates, I am aware that ample consideration is shown to the parents: but they are excluded from inheriting real property.

The Hindoo Law makes provision for the parents, but its rules differ generally from those of the Moohummudan Code, inasmuch as, agreeably to the former, several descriptions of heirs, varying in degree of relation, inherit successively, but not simultaneously.* According to the Hindoo Law, where there are sons or other lineal male descendants, they alone are the legal heirs. I make no mention of the provision assigned to the mothers and to the daughters; that to the former persons being assigned, only in the case of partition by sons, and that to the latter persons being accorded rather with a view to their maintenance than admitted as an absolute and indefeasible right of inheritance. According to the Moohummudan Law, on the other hand, the claim of the daughters to a share equal to half of what is taken by the sons is recognized as being on the same footing as the claim of the sons; and so also the claim of the father and mother, and husband and wife, to their specific allotments. The parents are entitled to the inheritance, by the Hindoo Law, only in default of male or female issue of the widow, and, conformably to some authorities, of the brothers also.*

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* In this respect the Civil Law seems to partake of the principles both of the Hindoo and Moohummudan Codes. It resembles the former in giving exclusive preference to the children, and it resembles the latter in permitting simultaneous succession of brethren and parents.

The apparently unjust preference of the elder son, to the exclusion of all the rest, which in our own Law had its origin in the feudal policy of the times, is rejected by the Moohummudan Law, and the equitable principle of equality obtains in its stead. The learned author of the Commentaries on the Law of England informs us, that "the Greeks, the Romans, the Britons, the Saxons, and even originally the Feudists, divided the lands equally."* He admits that this is certainly the most obvious and natural way, and quaintly observes, that "it has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice."† That there are reasons of expediency which suggest this preference there can be no doubt; but how far it may be consistent with justice may perhaps be questionable. It is by this principle of equality also that the Hindoo Law of successions is governed.‡

The only rule which bears on the face of it any appearance of hardship, is that by which the right of representation is taken away, and which declares that a son, whose father is dead, shall not inherit the estate of his grandfather together with his uncles. It certainly seems to be a harsh rule, and is at variance with the English, the Roman and the Hindoo Laws.§ The Moohummudan

* Blackst. Com. vol. 2, page 214.

† Ibid.

‡ Conformably to the ancient Hindoo Law, the right of primogeniture was partially recognized, "let the eldest have a double share, and the next born a share and a half, if they clearly surpass the rest in virtue and learning." Menu, chap ix. § 117, but the distinction in favour of primogeniture is abolished in the present age.

§ According to the Scottish Law, I find that although the right of representation is acknowledged as to real property, yet that it does not

doctors assign as a reason for denying the right of representation, that a person has not even an incohate right to the property of his ancestor, until the death of such ancestor, and that, consequently, there can be no claim through a deceased person, in whom no right could by possibility have been vested.

I have met with a passage in a learned author already quoted, which seems so apposite to the present subject, that I may be pardoned for transcribing it here: "On the proposition which we before advanced, *That parents are obliged to afford sustenance to their children, not only of the first, but of farther degrees, in case their proper parents, who ought to perform this office, are extinct,* is chiefly founded the *equity* of that *right* termed *the right of representation;* by virtue of which, children are supposed to fill the place of their deceased father, so as to be allowed the same share in the family inheritance as their father, were he now living, would receive; and, consequently, to succeed on the level with those who stand in their father's degree. And it would indeed be a lamentable misfortune, if, besides the untimely loss of their father, they would farther be deprived of those *possessions* which either the rule of the Law, or the design of their *progenitors,* had given their *parents* just hopes of enjoying. But if in any place the *civil constitutions* will not admit of this *representative right,* the children, who have been so unhappily bereaved of their father and of their hopes, must endeavour to bear the calamity as an affliction which Providence hath laid upon them."*

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obtain in the succession of moveables, except in the single case of a competition between the full blood and half blood.—Erskine's Principles, page 414.

* Puffendorff on the Law of Nature and Nations.—Book IV, ch. xi, §§ 12.

The rules of inheritance prescribed by this Code differ from those of any other with which I am acquainted. It would be a useless task to point out its peculiarities, as they are obvious. Perhaps the system to which it bears the nearest resemblance, is that of our own Law in distributing the personal property of an intestate, according to which, "when relations are found who are distant from the intestate by an equal number of degrees they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to each other. As if the next of kin of the intestate are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree, will all be admitted to an equal distributive share of his personal property."* But to this system even the resemblance must be admitted to be very faint.†

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* Blackst. Comm. vol. II, page 515, Note.

† There is a remarkable degree of similarity between the provisions of the English Law relative to the mode of disposing of an intestate's personal estate and the rules of the Moohummudan Law for administering to the property of a person deceased. In the Commentaries, treating of the duty of an executor or administrator, it is enjoined, "He must bury the deceased in a manner suitable to the estate which he leaves behind him, necessary funeral expences are allowed previous to all other debts and charges." The *Sirajyah*, treating of the successive duties to be performed with regard to the property of a person deceased, commences, "first his funeral ceremony and burial without superfluity of expence, yet without deficiency." The commentaries, "the executor or administrator must pay the debts of the deceased." The *Sirajyah*, "then the discharge of his just debts from the whole of his remaining effects." Again, the Commentaries, "when the debts are discharged, the legacies claim the next regard." And the *Sirajyah*, "then the payment of his legacies out of a third of what remains." Lastly, the Commentaries,

The Moohummudan lawyers have divided heirs* into three different classes, first, legal sharers; secondly, residuaries, and those are either by relation or by special cause; and thirdly, distant kindred. The legal sharers are the husband and wife, the father and mother, the grandfather and grandmother, the brother by the same mother, the sister by the same mother, the uterine sister, the sister by the same father, the daughter, and the son's daughter. The residuaries by relation are the sons and their descendants, the father and his descendants, the paternal grandfather in any stage of ascent and his descendants, and in some cases sisters and daughters. Those by special cause are the manumittors of slaves and their heirs. The distant kindred comprise all those relations who are neither legal sharers nor residuaries; and, in their default, the property goes to the successor by contract, and to persons of acknowledged, though not proved, consanguinity. It will be seen, on reference to the principles of inheritance, that many of the persons above enumerated have the privilege of simultaneous succession, whether the property be real or personal; which circumstance is the chief peculiarity of the Moohummudan Code.

The rules agreeably to which distributions are made would, at first sight, appear rather complex and intricate; but they may be speedily acquired by a very moderate

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"when all the debts and particular legacies are discharged, the surplus or residuum must be paid (where it is not left to the executor) to the next of kin: and the *Sirajyah*, and lastly, the distribution of the residue among his successors."

* Throughout this work I use the term "*Heir*" in its broadest sense, to signify any person who has a right of inheriting any species of property.

share of attention, and, when once known, there can arise no legal problem, relative to successions, which would not, by their means, admit of easy and satisfactory solution. It must, at the same time, be admitted, that the heterodox Code, or that which is observed by the *Schias* (commonly called the *Imameeya* sect, as they follow the doctrines of the twelve *Imams*) can boast of much greater simplicity. This Code has hitherto had no weight in India, and even at *Lucknow*, the seat of heterodox majesty itself, the tenets of the *Soonees* are adhered to. I have however, given a compendium of their law of inheritance, extracted from the "*Shuraya ool Islam*," a work of the highest authority among them. This I was induced to do, as no account has ever been rendered, to my knowledge, of the doctrine of the sect in question, on the law of inheritance; and as I have reason to believe that our courts of justice have passed decisions avowedly in conformity to its principles. Considering the universal toleration that prevails throughout the British dominions in India, it is perhaps but equitable, that the Law should be administered to the sectaries in question, agreeably to their own notions of jurisprudence, especially in matters affecting the succession to property, in which cases both parties are of course always of the same persuasion.

Where the Law expressly prohibits the receipt of interest on money, and all usurious contracts, it is natural to find the provisions regarding purchase, sale, and similar transactions, extremely simple and certain in their nature. Such is accordingly the case in the Moohummudan Law. There is no distinction made between sale and permutation; a barter of one commodity for another

being designated a sale. Even according to our own Law, the distinction is merely nominal, and there is no difference as to the legal provisions relative to sales and exchanges. The principal points of difference seem to be, the absence of any discrimination in the Moohummudan Law of sales of real and personal property, and its recognizing verbal contracts as of equal validity with written ones. Another essential point of difference is, that the maxim of *caveat emptor* finds no place in this code.

The most efficient safeguards against the effects of improvidence in purchasers are established, so much so, as almost to exclude the possibility of circumvention. A warranty is implied in every sale and a reasonable period of option may be stipulated, during which it is lawful to annul the contract. Where property has been purchased unseen it may be returned, if it does not fully answer the description, and the seller may at any time be compelled to receive back the property and refund the purchase money, on the discovery of a blemish or defect, the existence of which, when in the possession of the seller, may be susceptible of proof.

In exchange, where the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition to the validity of the contract, and no term of credit, on either side, is admissible, which would be advantageous to one of the parties, and savour therefore of usury; but where goods are sold for money, or money is advanced for goods, a term may be stipulated for the payment of the money, or for the delivery of the goods. So tenacious however is the Law, of certainty, that it will not admit of any, the least,

indefiniteness in the term. The date must be specified. From the above observations it will be seen, that the Moohummudan Law of sales does not differ very materially from the Civil Law, to which the provisions of the Scottish code bear a close resemblance.*

Sales of land and other immoveable property are clogged with an incumbrance, which is not, however, peculiar to this code. I allude to the Law of pre-emption. This confers the privilege on a partner or neighbour to preclude any stranger from coming in as a purchaser, provided the same price be offered as that which the vendor has declared himself willing to receive for the property to be disposed of.

In the Jewish Law† allusion is made to the custom, but it is not to be found among the ordinances of the Koran. On the authority of *Puffendorf* it would appear that the right in question was not unknown to the ancients. He states " another more easy sort of redemption, is what they call *Jus* προτιμήσεως, or the privilege of the first refusal, that is, if the buyer be hereafter disposed to part with the commodity, he must let the

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* The vendor, where he is not the true owner, cannot, by delivery, transfer to the purchaser the property which was not his to give; but the purchaser, in respect of his *bonâ fide*, makes the fruits of the subject his own, till it be evicted, or at least reclaimed, by the true owner, 2. 1. 14. And, as warrandice is implied in all sales, the vendor must make the subject good, if it be evicted, 2. 3. 11. The insufficiency of the goods sold, if it be such as would have hindered the purchaser from buying had he known it, and if he quarrels it recently, founds him in an action, (*Actio redhibitoria*) for annulling the contract. If the defect was not essential, he was, by the Roman Law, entitled to a proportional abatement of the price, by the action *quanti minoris*.—Erskine's Principles, page 310.

† Leviticus, chap. xxv.

seller have the first refusal at the same rate he would sell it to another. In many cases, certain persons pretend to this privilege by Law, as the landlord in the sale of his tenant's stock, the creditor in his debtor's goods, the neighbour in the purchase of a neighbouring farm, any members in a thing that belongs to the society, and the next of kin in the goods of their relations, which is peculiarly called *retractus gentilitius*, or the family privilege."* For a long time, I was of opinion that the municipal Law of the Hindoos had no provision to justify the claim of such a privilege; and, indeed, the more current authorities are entirely silent on the subject.† Hindoo litigants, of course, have endeavoured to assume it whenever self-interest dictated; but I was not, until lately, aware that any authority could be cited in its support. By the Moohummudan Law, unquestionably, Hindoos have the same title to claim the privilege as Moosulmauns; but, assuming it to form no part of their own Law, I apprehend they ought not to be permitted to take advantage of the doctrine in question. The principles of the Hindoo and Moosulmaun Codes are declared applicable to cases of inheritance, contract, &c., arising among these two great

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* Book V, chap v, §§ 4.

† The right of pre-emption does not exist under the Hindu law prevalent in Bengal and Benares. Vide Cases cited in Morley's Digest, vol. 1 and New Series—Tit. Pre-emption—and Decree of the Madras Sudr Udalut in No. 8 of 1848. It has however been upheld where custom was shown to prevail, Ibid. And has been allowed where a special agreement existed between the claimant and the seller. Decree of M. S. A. in No. 87 of 1853. It was ruled in 7 S. D. A. Rep. 129 that where the right of pre-emption among Hindus is recognized on the ground of local custom, the rules and restrictions of the Mahomedan law are applicable to claims of that nature.—Ed.

bodies of the community; but, at the same time, applicable respectively only. It is declared, also, that where the parties are of different persuasions, the Law of the defendant shall be adhered to, but by this provision, it was never intended that a plaintiff might make his election between the two Codes, and prefer a claim to be decided by that Law which best suited his particular purpose.—While officiating, as judge of the *Zillah* Court of *Shahabad* I made a reference to the *Sudder Dewanee Adawlut* on a point connected with this question, to the following effect: "does the Moohummudan Law of *Shoofaa*, or right of pre-emption extend to Hindoos? or in other words, would the Court be justified in entertaining and investigating a claim preferred by one Hindoo against another, and resting solely and avowedly on the principle of Law above-mentioned? I am supposing the defendant either to have demurred on the plea of the inapplicability of the Law quoted to his case, or from ignorance, or from thinking that he had other substantial grounds of defence, or from any other cause, to have neglected making the objection; but at the same time not to have expressly admitted his willingness to leave the point at issue to be tried according to the provisions of that Law. I can find only one case (the first) among the printed reports at all bearing on the point: there is a remark subjoined which seems by no means satisfactory or conclusive: the case is clearly not included in the Letter of Section XV. Regulation VI. 1793, nor in any subsequent enactment; but I observe in Mr. Harington's analysis, that on a reference to the *Sudder Dewanee Adawlut* in the year 1798, the Court were of opinion that the spirit of the rule for observing the Hindoo and Moohummudan Laws was applicable to cases of slavery, though not included in

the letter of it. The same principle of construction might, I think, be extended to this case: I conceive that a Moohummudan, with as much reason, might sue his brother for the *Jethansha*,* or larger share in right of primogeniture, according to the Hindoo Law. In the *Hidaya* the right of *Shoofaa* is declared to be but a feeble right, as it is the disseizing another of his property, merely in order to prevent apprehended inconvenience: its extension to all cases of neighbourhood cannot fail to depreciate the value of landed property; and being impressed with a conviction of the unreasonableness of the Law in question, according to modern construction, I should feel very much inclined to circumscribe its operation within as narrow bounds as possible. The suits which occasioned the present reference are seven in number. The parties, at least the *Shafee* or claimant of the right, and the seller or defendant, are the same individuals in all the seven suits. These two persons purchased at public auction, four or five years ago, several very valuable estates, totally distinct from each other, with separated and defined boundaries. One of them having lately disposed of some of his *Mouzas*, by private sale, the other (who resides at Benares) sues him and the purchasers jointly, on his alleged right of pre-emption; the property of the claimant bordering on that sold. In four of the cases the defendant pleaded his own cause, and no demurrer was made on the plea of the inapplicability of the Law to the parties. In the other three, vakeels were entertained, and the objec-

* This right is obsolete in the *Cali* or present age among the Hindoos, but as it still retains a place in their law books, and is a characteristic feature of their Code, it served for the purpose of illustration on this occasion.

tion was made. Under such circumstances, it can hardly be contended, that the omission in the pleadings implied that the defendant considered himself amenable to the Law in question; and I felt disposed, therefore, to nonsuit the plaintiff. I should have done so, had I not reason to believe that cases have been tried and decided on the merits under similar circumstances, and that an express authoritative opinion on the subject would effectually remove all doubt, and, by preventing one cause of unreasonable litigation, prove essentially beneficial to the community at large." To the above reference I was informed, in reply, that no rule of Mohummudan Law could apply to a civil suit in which the parties are Hindoos, as they would appear to be in the cases to which my query related; that the Court did not hold the 15th Section of Regulation IV. 1793, to preclude me from ascertaining from my Hindoo law officer whether the right of pre-emption was recognized by the Hindoo Law, and if so, what the provisions of the Law respecting it were; and that, at the same time, it was obvious, that it was not one of those cases in which the Regulations necessitate the Judge to follow the Law as expounded by his Law Officer, should it appear to be irreconcileable with well established local usage, or to be otherwise mischievous or manifestly inconvenient. Since, however, I had occasion to make this reference, I have found in the *Muha Nirbana Tuntra,* a work which chiefly treats of mythology, a passage which would seem to imply that pre-emption is recognized as a legal provision according to the notions of the Hindoos. For the gratification of the curious I subjoin in a note the passage,* with a

* Sanscrit omitted.

translation.* But it remains yet to be decided whether this shall be held to be practical Law or no.† The Pundit with whom I perused the passage in question, declared that the right of pre-emption takes effect only in cases where positive injury would result to the neighbour by the sale to a stranger; and, from the tenor of the last sentence, such would, indeed, seem to be the effect against which the provision was intended to guard.

It is true that there are numerous devices by which a claim, founded on the right of pre-emption, may be avoided, and that the Law itself, admitting its weakness,

* The proprietor of immoveable property, having a neighbour competent to purchase it, is not at liberty to sell such property to another. Among neighbours, he who is a relation, or of the same tribe, is preferred. In their default a friend. [Here] the will of the seller prevails; even though the price of the immoveable property be agreed upon with another, yet if a neighbour [pay] the price, he is the purchaser, and not another. If the neighbour be unable to pay the price, or be consenting to the sale, the proprietor is then at liberty to sell it to another. O goddess! if immoveable property be sold in the absence of the neighbour, and he (the neighbour) pay the price immediately on hearing of the sale, he is competent to take it. But should the purchaser, having made houses or gardens, be in the enjoyment of them, the neighbour is not entitled to take such immoveable property even by paying the price. A person is at liberty, without permission, to cultivate lands which pay no revenue, or have been usurped, or waste, or, though not waste, are extremely difficult of access. He may enjoy the rest, having given to the king the tenth [of the produce] of the lands thus with difficulty acquired; the king being lord of the soil. A proprietor is not at liberty to dig ponds, wells, or pools, in a place where it would be annoying to others.

† The interminable and troubled ocean of Hindoo jurisprudence is sure to present something for the support of any opinion which it may be desirous to keep afloat, for the purpose of temporary convenience; and were the expounders of this Code restricted in their citations to a few works of notorious authority, it might have a salutary effect in curbing their fancy, if not their cupidity.

NOTE.—Vide Cases referred to in the note at page xv. which appear to set at rest all doubt on this point.—ED.

has annexed hard conditions to the establishment of its validity. But these are not sufficient bars to litigation in India, when opposed to the natural propensities of the natives, and the trifling expence at which they may purchase the gratification of inflicting legal annoyance.

The Law is extremely favourable to the donor where property is gratuitously conveyed. A gift should always be accompained by delivery of possession. False pretences, legal incapacity, or other similar circumstances, under which the validity of a gift may be questioned, and which would render it either void *ab initio*, or voidable, need not be specified: they are the same as those which obtain in most other codes of jurisprudence, and they would no doubt avail in case of a suit brought by any representative of the donor to set aside a gift unduly made. But as to the donor himself, he has power to demand restoration, even where the gift may not have been attended by any disqualifying circumstances. This power, however, of revoking gifts, is subject to certain limitations. According to the English Law, a gift is revokable only under circumstances which would equally have operated to avoid any species of contract.* According to the Civil Law there were three causes only which could justify the revocation of a gift.† But, according to the Mohummudan Law, there are only seven circumstances under which a gift is not revokable.‡ A gift made on a death-bed, though not made in contemplation of death, is nevertheless not considered as a gift *inter vivos*, but has the effect of a legacy only, and consequently cannot

* Blackst. Com. vol. II, page 441.

† Browne's Civil Law, vol. I, page 229.

‡ See Prin. of Gifts, page 51, §§ 13, and Prec. of Gifts, page 224.

extend to more than a third of the donor's estate. On comparing the chapter containing the principles of gifts (pages 50 to 52 of this work) with the contents of the subjoined note§ taken from an authority already cited, but little difference will be found to exist. It should here, however, be mentioned, that though gifts to relations are generally irrevocable, yet a gift from a father to his minor son is revocable at the pleasure of the former. The right of a husband to revoke a gift to his wife, and *vice versâ,* does not appear to be recognized, as it is in the Roman and Scottish Laws.

The disposition of a testator being legally restricted to one-third of his estate, but little uncertainty can exist on the doctrine of wills and testaments. If the legacies exceed the amount above specified, the will is con-

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§ All donations, whether by the wife to the husband, or by the husband to the wife, are both by the Roman Law and ours, revocable by the donor: *ne conjuges mutuo amore se spolient, l.* 1, *de don. int. vir & ux.;* but if the donor dies without revocation, the right becomes absolute. A right may be revoked, not only by an explicit revocation, but tacitly, by afterwards conveying to another the subject of the donation, or by charging it with a burthen in favor of a third party; but in so far as the subject is not burthened, the donation subsists. Though the deed should be granted nominally, or in trust, to a third party, it is subject to revocation, if its genuine effect be to convey a gratuitous right from one of the spouses to the other; *plus enim valet quod agitur, quam quod simulate concipitur.*—Where the donation is not pure, it is not subject to revocation: Thus, a grant made by the husband, in consequence of the natural obligation that lies upon him to provide for his wife, is not revocable, unless in so far as it exceeds the measure of a rational settlement. Neither are remuneratory grants revocable, where mutual grants are made in consideration of each other, except where an onerous cause is simulated, and a donation truly intended.—Erskine's Principles, page 77.

sidered inofficious, and its provisions will be carried into effect *pro tanto* only. The law of Scotland also restricts a person, who leaves a widow and children, from disposing of more than a third part of his moveable property by will.* Nuncupative and written wills are of equal validity, and the same degree of evidence is required to prove them as is necessary to the establishment of any other ordinary transaction between man and man.

The latitude granted by the permission of polygamy, and the apparent facility of divorce, are not, it must be admitted, accordant with the strict principles of impartial justice; but the evil, I believe, exists chiefly in theory, and but little inconvenience is found to follow it in practice. It is remarkable with what tenderness the rules relative to marriage and parentage are framed. Mr. Evans, in his Appendix to Pothier, treating of hearsay evidence, observes, "there is a disinclination to bastardize issue, which is sometimes perhaps carried too far. When parties are actually married, and there is no impossibility of the husband being the father of the issue of the wife, every consideration of decency and propriety repels the

* If a person deceased leaves a widow, but no child, his testament, or, in other words, the goods in communion, divide in two; one half goes to the widow, the other is the dead's part, i. e. the absolute property of the deceased, on which he can test, and which falls to his next of kin, if he dies intestate. Where he leaves children, one or more, but no widow, the children get one half as their legitim; the other half is the dead's part, which falls also to the children, if the father has not tested upon it. If he leaves both widow and children, the division is tripartite; the wife takes one-third by herself; another falls, as legitim to the children, equally among them, or even to an only child, though he should succeed to the heritage; the remaining third is the dead's part.—Erskine's Principles, page 418.

admission of evidence to the contrary; but when the question is, whether a person was or was not born during wedlock, it should be recollected that the interests of justice are concerned in preventing one, who is really a bastard, from usurping the rights of the legitimate members of the family; and there is no particular reason of public policy which requires that those who have the real rights in their favour should meet with peculiar obstacles in *substantiating the proof* of usurpation."* But the Moohummudan lawyers carry this disinclination much farther: they consider it a legitimate course of reasoning, to infer the existence of marriage from the proof of cohabitation.

None but children who are in the strictest sense of the word *spurious* are considered incapable of inheriting the estate of their putative fathers. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where, by any possibility, a marriage may be presumed, the Law will rather do so than bastardize the issue; and, whether a marriage be simply voidable or void *ab initio,* the offspring of it will be deemed legitimate. Much misconception exists, I imagine, however, relative to the Moohummudan Law on the subject of legitimate and illegitimate issue, and it seems generally supposed that, agreeably to its provisions, no person can be considered a bastard. The learned Sale observes, that "among the Moohummudans the children of their concubines or slaves are esteemed as generally legitimate with those of their legal and ingenuous wives, none being accounted bastards except such only as are born of *common* women,

* Vol. II, page 291.

and whose fathers are unknown." This, I apprehend, with all due deference, is carrying the doctrine to an extent unwarranted by Law, for where children are not born of women proved to be married to their fathers, or of females, slaves to their fathers, some kind of evidence (however slight) is requisite to form a presumption of matrimony. The mere fact of casual concubinage is not sufficient to establish legitimacy, and if there be proved to have existed any insurmountable obstacle to the marriage of their putative father with their mother, the children (though not born of *common* women) will be considered bastards to all intents and purposes. Another learned author also, citing the law of Solon, that a bastard shall not be deemed next of kin, nor any relation be supposed between him and the proper sons, proceeds to state, "on the contrary, amongst the Mahometans, as to the point of sharing the father's estate, there is no difference observed between the sons of the wife, the concubine, or the servant maid;" whereas, in point of fact, the marriage of a free woman, proved or presumed, is the only ground for considering her issue legitimate.* It must be admitted, at the same time, that there is no more difficulty in establishing a marriage by the Moohummudan than by the Scottish Law, according to which, though no formal consent should appear, marriage is presumed from the cohabitation, or living together at bed and board of a man and woman who are generally reputed husband and wife.† Marriage also, according to this Code, is entirely a civil contract. In answer to the question as to whether it was necessary

* Puffendorf, book IV, chap. xi, §§ ix.

† Erskine's Principles, p. 67.

for a marriage to be celebrated by a *Kazee,* the law officers attached to the Provincial Court of Bareilly delivered an opinion, on the 19th of April 1823, suggesting the expediency of the observance of this form, rather than its necessity. They stated, for instance, that silence is an argument of consent, on the part of a woman, only when she is addressed by her near guardian or by the *Kazee,* of which point of Law illiterate persons might not be aware, and that where the bride does not appear in person, which is usual in this country, it is requisite that her agent should prove his commission to act on her behalf by witnesses, in the presence of a *Kazee.* One grand distinction between the Moohummudan Law and our own, and in which the former resembles the Civil Law, is that, according to it, the husband and wife are considered as distinct persons, who may have separate estates, contracts, debts, and injuries.*

Their sentence of divorce is pronounced with as much facility as was repudiation among the Romans, in case of espousals. There is no occasion for any particular cause; mere whim is sufficient. I have already alluded to the small inconvenience which this facility produces in practice. Where conscientious and honourable feelings are insufficient to restrain a man from putting away his wife, without cause, the temporal impediments are by no means trifling. Dower is demandable on divorce, and, with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of the husband to pay.

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* Browne's Civil Law, vol. I, p. 37.

The mode by which a wife is endowed, according to the Moohummudan Law, partakes partly of the nature of a jointure and partly of common dower, according to the Law of England. Where the estate which she is to take is specified, at the time of marriage, or subsequently thereto, it is a jointure to all intents and purposes, and the widow may enter upon it at once, without any formal process; but where no particular estate or amount in money may have been specified, she is entitled to her *Muhr misl* or proportionate dower, which, it must be admitted, is but ill defined, being so much as it may be found to have been usual, on an average estimate, to endow other females of the same family with. But, whatever the widow may gain in right of dower or jointure, she is not thereby precluded from coming in as one of the heirs, and claiming her indefeasible right of one-fourth, when her husband may have died childless, and of one-eighth, when he may have left children. It is a common practice (as was before observed) to stipulate for dower to an excessive amount, and as this claim precedes that of inheritance, it might be inferred that the rights of children and other heirs are frequently defeated: but this is rarely the case. It seldom happens that a widow contracts a second marriage, and the property generally goes to the children of the original proprietor. There are weighty considerations in favour of the practice: Nothing seems so well calculated to preserve the peace, the property, and the character of families.

Guardians are of two descriptions, natural and testamentary: the natural guardians are the father and fa-

ther's father, and the paternal relations generally, in proportion to their proximity to succeed to the estate of the minor: the testamentary guardians are the executors of the father and grandfather. The father and grandfather are competent to the office of curator, as well as tutor, or, as they are expressed in the Bengal Code of Regulations, of manager as well as guardian; their executors (being strangers) can act as curators only, and the other paternal relations as tutors only. From this it would appear, that in providing for the care of minors, the Moohummudan Law partially agrees with the Roman, "committing the care of the minors to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding, and this they term the *summa providentia*."* With a view, however, to afford some protection to the minor, the law requires that, until he be independent, or, according to the more approved doctrine, until he attain the age of seven years, he should remain in the custody of his mother, and in her default, in that of some other female relation; and indeed, in the *Hidaya*, in treating of this custody, some danger seems to be apprehended from trusting a minor with one who, though sufficiently near in point of relation to inherit the estate, is not near enough to entertain any very strong affection for his ward. It is stated in page 387, vol. 4, "If there be no woman to whom the right of *Hazanit* appertains, and the *men* of the family dispute it, in this case the nearest paternal relation has the preference, he being the one to whom the authority of guar-

* Blackst. Comm. vol. I, page 461.

dian belongs: (the degrees of paternal relationship are treated of in their proper place) but it is to be observed, that the child must not be entrusted to any relation *beyond* the prohibited degrees, such as the *Mawla*, or emancipator of a slave, or the son of the paternal uncle, as in this there may be apprehension of treachery." This principle of entrusting the guardianship to an heir, has not wanted its advocates. Lord Macclesfield condemned the opposite rule, and declared it not to be grounded upon reason, but to have prevailed in barbarous times, before the nation was civilized.* Solon, it appears, was of the same opinion with the English lawyers; Lycurgus with the Roman.† The Regulations of Government, however have, (as far as the guardianship of the person is concerned) seemed to adopt the maxim of English Law, that "to commit the custody of an infant to him that is next in succession is *quasi agnum committere lupo ad devorandum;*"‡ and, consequently, they are distinctly§ precluded from the trust by Section II, Reg. I, of 1800, which declares, that "the guardianship is in no instance to be entrusted to the legal heir of the ward, or other person interested in outliving him." The good sense of the Law of Charondas is recognized, who separated the care of the person and estate, giving that of the latter to the next heir.‖ By Section VIII, Reg. X, of 1793, it was enacted, that, in the selection of a manager,

* Blackst. Comm. Note to page 461, vol. I.

† Browne's Civil Law, Note to page 89, vol. 1.

‡ Blackst. Comm. page 461, vol. I.

§ The same exclusion is provided in the Madras Regulations on the subject.—Ed.

‖ Browne's Civil Law, Note to page 89, vol. I.

preference should be given to the legal heirs of the estate; and although that rule has been rescinded, and it is now no longer obligatory to show such preference, where better managers may be procurable, yet the principle of the rule remains unchanged, and the legal heirs are still, at least equally eligible with other persons. The Regulations* of Government also, by defining the age at which persons shall be held to have attained majority, have precluded the occurrence of many disputes which might arise, were this circumstance to be judged of by the indefinite criterion of Moohummudan Law; a criterion more fallible even than that of the hability† of the civilians. The rules relative to guardian and ward are remarkable for their equity and good sense: while scrupulously regardful of the interests of the minor, he is nevertheless not exempted from responsibility, where justice obviously requires that he should be considered liable. On perusing the chapter treating of these subjects (page 64 of this work) it will be seen, that the provisions relating to them do not differ very widely from those contained in Colebrooke's Dissertation on

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* By Section 2, Regulation 26, 1793, the minority of both Moohummudans and Hindoos is declared to extend to the end of the eighteenth year.

† Liberantur tutelâ masculi quidem pubertate. Puberem autem *Cassiani* quidem eum esse dicunt qui habitu corporis pubes apparet; id est, qui generare potest. *Proculeii* autem, eum qui quatuordecim annos explevit. Verum *Priscus* eum puberem esse in quem utrumque concurrit, et habitus corporis et numerus annorum. *Pandect. Justin.* lib. xxvi, §§ ix.

Obligations and Contracts, book iv, chap. x, §§ 584, *et passim*, which I have subjoined in a note.*

The question† of Moohummudan slavery seems to be but little understood: according to strict law, the state of bondage, as far as Moosulmauns are concerned, may be said to be almost extinct in this country. They only are slaves who are captured in an infidel territory in time of war, or who are the descendants of such captives. Perhaps there is no point of law which has been more deliberately and formally determined than this. Its accuracy, it might have been hoped, was established beyond all question; and yet it is only very lately that a contrary opinion was delivered by a law officer belonging to one of the courts of judicature under this Presidency. I subjoin it, with a translation,‡ as a curious spe-

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* The promise or executory agreement of a minor, not apparently beneficial, and still more, one that is on the face of it prejudicial to him, is absolutely void. An engagement apparently beneficial to him is only voidable, yet a contract made by a minor, with the advice and consent of his friends, will be held binding where in conscience it ought. Minors may be charged for trespasses and torts: they are bound by obligations arising from delinquency.

† This question has been set at rest, it is to be hoped for ever, throughout British India, by Act V of 1843 which abolished slavery. Slaves are now capable of possessing the same rights as freemen. The observations of the Author, however, are notwithstanding valuable, as illustrative of the law of slavery which is still recognized in Mahomedan States.—Ed.

‡ Original omitted. *Translation.*—Question:—Legally, by how many means is the right of property over male and female slaves acquired?

Answer:—The original condition of man is freedom, and, in the opinion of the generality of lawyers, mankind becomes a subject of property, solely by reason of infidelity and residence in an hostile country, joined to the fact of subjugation. When infidelity and resi-

cimen of the arguments and devices not unfrequently used to mislead, and to perplex the simplest question. The

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dence in an hostile country are united in the same individual, all the qualities of neutral property attach to him. But, as the proprietary right to neutral property depends on subjugation, they continue without proprietors until they are appropriated, in like manner as dominion is established over other property, such as grass, trees, herbs, &c. &c. as is laid down in the *Jami oo roomooz* and other authorities; "infidels are slaves in an hostile country, although not the property of any individual." It is proved therefore that infidels in an hostile country are neutral property, and that the proprietary right to them depends on subjugation; but subjugation may be accomplished by various means. One mode is when a Moohummudan ruler conquers an infidel city and makes captive its inhabitants, in which case he is at liberty either to kill or enslave them, as is laid down in the *Hidaya*; "if an *Imam* conquer an infidel country by force of arms, he is at liberty either to slay the captives or to enslave them." When they are made slaves all the qualities of property attach to them, and they become subjects of purchase, sale, inheritance, and all other legal contracts, in the same manner as other property. The offspring also of female slaves whom their masters may have given in marriage, are the property of their masters. A second mode is when the inhabitants of one hostile country subjugate those of another and make them prisoners; in such case proprietary right is established, as is laid down in the *Futtih ool qudeer*, the *Aulumgeeree* and the *Hidaya*; "if infidels of Turkistan conquer infidels of Rome and make captives of them or seize their property, they are the rightful proprietors; and if Moosulmauns should afterwards conquer those infidels of *Turkistan*, whatever property of the infidels of *Rome* they may find with those infidels of Turkistan, is lawful to them." A third mode is when the king of an hostile state, having seized men and women, sends them from his own country as presents to a Moohummudan king or other person of distinction; in such case proprietary right is established, as *Mokawkus*, the governor of Egypt, sent Mary the Copt from Alexandria as a present to the Prophet, who treated her as a slave. A fourth mode is when a *Moostamin*, having gone into an hostile country, submits to the form of marriage with an

two principal quotations, which are in support of his opinion, are extracted from the *Jamiooroomooz* and the

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infidel woman, and pays the amount of her dower to her guardians, and brings her out of that country by force and arms; in such case proprietary right is established, as is laid down in the *Futtih ool qudeer* and other authorities; "if a person marry an infidel woman in an hostile country, and then forcibly bring her into a Moosulmaun territory, the marriage will be good and she will become a subject of sale." A fifth mode is when a Moosulmaun enters a hostile country under protection, and purchases from one of the inhabitants of that country his son or daughter, in such case proprietary right is established, as is laid down in the *Jami oo roomooz* and other authorities: "if a Moosulmaun enter their country under protection, and purchase from one of them his son, and then bring him forcibly into a Moosulmaun territory, he becomes the proprietor of him; but the generality of lawyers are of opinion that the purchaser is not proprietor of him in his own country, and this is the correct opinion." A sixth mode is when a Moosulmaun or an infidel alien enters a hostile country, whether with or without protection, and takes an inhabitant of that country either by theft or plunder, and brings him either into a Moohummudan or into another country, in such case proprietary right is established; as is laid down in the *Ibrahim Shahee*, the *Sirajyah*, and other works; "if a Moosulmaun enter a hostile country under protection, and having taken a boy by robbery bring him to us, the boy will be a Moohummudan: the contrary would be the case if he had purchased, and then brought him out, in which case he would continue of his own religion. It is not mentioned in the case first put, whether the boy should be considered free or a slave. It is fit however that he should be considered a slave. I heard my preceptor Iftikhar ool Ayma Zahir Ul Bokharee say, that he had purchased a female native of Turkistan, and that he married her under the apprehension that she might have been taken by robbery, or fraud, or similar means. From this it would follow that a person so taken is not a slave, but the received opinion is that he is a slave, inasmuch as the cause of proprietary right is the taking *vi et armis*, which the term "robbery" may imply." The

Ibrahim Shahee. The words which are underlined were entirely omitted in the Futwa, and it will be observed,

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seventh mode is when an infidel alien enters a Moohummudan territory, without seeking protection, and a Moosulmaun seizes him, in which case he is the property of the whole Moosulmaun community; as is laid down in the *Ibrahim Shahee* and other works; "if an infidel alien enter a Moohummudan territory without protection, and a man seize him, he becomes the property of the whole community of Moosulmauns; and, according to the opinion of *Yoosuf* and *Moohummud*, he belongs to the seizer alone. If, by any one of these various modes of subjugation, the inhabitant of an hostile territory come into the possession of a Moohummudan, he will be subjected to the laws of slavery, even though no holy war be waged against the infidel country; and, as in most countries, particularly in *Hindostan*, holy wars have ceased to be waged, the practices of purchase and sale, and the other modes of subjugation abovementioned prevail. Some lawyers also have maintained the validity of the sale of freemen in difficulty and famine, as is laid down in the *Futawa Itabeeya*, the *Zukheera*, the *Moheet* and other authorities; "Moohummud was interrogated relative to the case of a freeman who sold himself from fear of perishing through famine: he replied, that the sale of himself by a freeman, under such circumstances, is allowable, but not otherwise. He was further questioned as to whether connexion with a female, sold under such circumstances, was legal: and he replied in the affirmative, and that the parentage of the offspring would be established in the father." It is stated in the *Mooheet* that the sale of a freeman is not allowable unless he be unable to discharge a debt which is due from him, or unless he be distressed, being involved in difficulties which endanger his existence, or be reduced to such an extremity as would justify his eating carrion (in which instances it is lawful) because in the time of Joseph, men were in the habit of selling themselves. It is laid down in the *Futawa Mokhtusuri Shafee*, that it is allowable for weavers, coblers, and certain other descriptions of infidels, to sell their own persons, even though not in time of famine or difficulty, conformably to usage: "for the usage of each country is different, and the peculiar usage, whatever it may be, is allowable." On this authority many lawyers have given opinions as to the validity of purchase and sale by the infidels of this country, and by the mountaineers

that the omissions are important. The term which is the very essence of the sentence, is twice omitted; and it is solely from the use of that word, which signifies *vi et armis,* that any support is derived to the doctrine, of infidels taken by robbery, being slaves in the legal acceptation of the term; the exertion of such force being held by some authorities to constitute *isteela* or subjugation. The Story of Mary the Copt is quite out of place,* as it is notorious that Moohummud had many

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of their own persons and of their wives and children, should it be customary and not objected to among them; and persons thus sold are also legal slaves.

* I cannot perhaps better verify this assertion than by quoting an extract from a note of the learned Sale on the chapter of the *Koran* which was revealed to enable Moohummud to absolve himself from an engagement which he had made to refrain from cohabiting with the said Mary, "Mohammed having lain with a slave of his, named Mary, of Coptic extract, (who had been sent him as a present by Al Mokawkas, governor of Egypt,) on the day which was due to Ayesha, or to Hafsa, and as some say, on Hafsa's own bed, while she was absent, and this coming to Hafsa's knowledge, she took it extremely ill, reproached her husband so sharply, that, to pacify her, he promised with an oath, never to touch the maid again (2); and to free him from the obligation of this promise was the design of the chapter. I cannot here avoid observing, as a learned writer (3) has done before me, that Dr. Prideaux has strangely misrepresented this passage. For having given the story of the prophet's amour with his maid Mary, a little embellished, he proceeds to tell us, that in this chapter Mohammed brings in God, allowing him, and all his Moslems, to lie with their maids when they will, notwithstanding their wives: (whereas the words relate to the prophet only, who wanted not any new permission for that purpose, because it was a privilege already granted him (1), though to none else:) and then, to show what ground he had for his assertion, adds, that the first words of the chapter are, O prophet, why dost thou forbid what God hath allowed thee, that thou mayest please thy wives? God hath granted unto you

privileges which are denied to the votaries of his religion. Without further comment I leave the reader to judge of the *animus* which dictated the misquotation.

Of those who can legally be called slaves but few at present exist. In the ordinary acceptation of the term, all persons are counted slaves who may have been sold by their parents in a time of scarcity, and this class is very numerous. Thousands are at this moment living in a state of hopeless and contented, though unauthorized, bondage. That the illegality of this state of things should be known is certainly desirable. The law may interpose its authority in cases of peculiar hardship and cruelty. I believe, however, it will be found, that there is little moral necessity for such interposition. In India (generally speaking) between a slave and a free servant there is no distinction but in the name, and in the superior indulgences enjoyed by the former: he is exempt from the common cares of providing for himself and family: his master has an obvious interest in treating him with lenity, and the easy performance of the ordinary household duties is all that is exacted in return. The impor-

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to lie with your maid-servants (2). Which last words are not to be found here, or elsewhere, in the Koran, and contain an allowance of what is expressly forbidden therein (31); though the doctor has thence taken occasion to make some reflections which might as well have been spared. I shall say nothing to aggravate the matter; but leave the reader to imagine what this reverend divine would have said of a Mohammedan, if he had caught him tripping in the like manner." It is written also in the *Koran*, "O Prophet, we have allowed thee thy wives unto whom thou hast given their dower, and also the slaves which thy right hand possesseth, *of the booty* which God hath granted thee," on which Sale has observed in a note, "It is said, therefore, that the women slaves which he should buy are not included in this grant." Sale's Koran, vol. II, page 281.

tation of slaves by sea has been prohibited, and human beings, it may be hoped, have, in this quarter of the world, ceased to be commodities of merchandize. The sales of children, which do take place, are (setting aside the fact of their illegality) devoid of all the disgusting features which characterize the Slave Trade: they are not occasioned by the *Auri sacra fames*, but by absolute physical hunger and starvation; and the morality must be rigid indeed, which would condemn as criminal, the act of a parent parting with a child, under circumstances which render the sacrifice indispensable to the preservation of both.*

Slaves, in the legal acceptation of the term, are certainly considered merely as *things:* they are subject, as other property, to the common Law of Inheritance; and they cannot be manumitted to the prejudice of heirs or creditors; they may, by special licence, be allowed to trade, but, generally speaking, they have no civil rights or capacities.

The rules relative to endowments are worthy of attention: under the existing regulations, it is true, that a check has been put to appropriations of land for pious purposes; but there still remain many ancient endow-

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* Since writing the above I have met with some observations of Mr. H. T. Colebrooke in the third volume of Mr. Harington's Analysis, pages 745 and 747, which so fully justify the opinion I have ventured to express, that I cannot resist the gratification of quoting them here, "Indeed, throughout India, the relation of master and slave appears to impose the duty of protection and cherishment on the master, as much as that of fidelity and obedience on the slave: and their mutual conduct is consistent with the sense of such an obligation; since it is marked with gentleness and indulgence on the one side, and with zeal and loy-

ments scattered over different parts of India, which the liberality of the British Government has permitted to continue devoted to the purposes designed by their founders. The authority which the State has reserved to itself over these institutions is merely intended for the purposes of preservation, and is consistent with what the Moohummudan Law itself permitted to the ruling power.*

The rules relative to debtors, in general, are extremely lenient: perhaps the most prominent instance of this, which can be cited, is the case of several persons contracting a joint obligation in favour of another. As the principles of the Moohummudan Code exactly coincide with those of the Civil Law, I cannot exemplify the rules on the subject more effectually than by extracting the following passage from Pothier, "Solidity may be

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alty on the other. During a famine, or a dearth, parents have been known to sell their children for prices so very inconsiderable, and little more than nominal, that they may, in frequent instances, have credit for a better motive than that of momentarily relieving their own necessities, namely, the saving of their children's lives, by interesting in their preservation persons able to provide nourishment for them. The same feeling is often the motive for selling children, when particular circumstances of distress, instead of a general dearth, disable the parent from supporting them. There is no reason to believe that they are ever sold from mere avarice, and want of natural affection in the parent: the known character of the people, and proved disposition in all the domestic relations, must exempt them from the suspicion of such conduct: but the pressure of want alone compels the sale, whether the immediate impulse be consideration for the child, or desire of personal relief."

* See Prin. Endowments, pages 69, 70 & 71, and Regulation XIX, 1810, for the due appropriation of the rents and produce of lands granted for the support of mosques, temples, colleges, and other purposes, &c., &c.

stipulated in all contracts of whatever kind; but regularly, it ought to be expressed; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part. And this is confirmed by Justinian in the Novel (99). The reason is, that the interpretation of obligations is made, in cases of doubt, in favour of debtors, as has been shown elsewhere. According to this principle, where an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor, it was adjusted that the fourth, by ratifying the sale, was not to be considered as having sold *in solido* with the others: for, although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede *in solido*."* Numerous other examples might be adduced to show that the Law leans entirely in favour of those against whom a claim may be made, and who may have committed no wilful wrong. This system, if not in all cases reconcileable with strict justice, is at least captivating, from the apparent benevolence of the motives by which it is governed.

The rules relative to the pursuit of remedies by action do not seem to require particular comment. Superseded as they have been by the Regulations of Government, they are now rather matter of curiosity than utility. Their provisions more nearly assimilate to those of the Civil Law than our own. Thus, the oath of the parties, or their refusal to swear, constitutes one mode of arriving at judgment, in default of better evidence. A

* Vol. 1, page 147.

defendant may plead the general issue, and at the same time adduce special matter to evade the plaintiff's claim. If the special matter so pleaded be such, that, by the failure to prove it, the claim of the plaintiff would not be established, the *onus probandi* does not rest with the defendant; although, by the proof of it, the claim of the plaintiff would fall to the ground, for it is a maxim, that, "*ei incumbit probatio qui dicit non qui negat.*" But where the special plea is such, that, by the failure to prove it, the claim of the plaintiff would be established, the *onus probandi* rests with the defendant. As if, in case of a debt upon contract, the defendant were to plead "*nihil debet,*" and at the same time to allege the poverty of the plaintiff to have been such as to be incompatible with his demand. Here, if he failed to prove the latter allegation, the claim of the plaintiff would nevertheless remain to be proved, and, to put the defendant therefore to the proof of it would be mere waste of time. But if he were to plead "*solvit ad diem,*" the "*onus probandi* would rest with him, because here, on failure of proof, the claim of the plaintiff would be established

It is a general rule, that no claim is admissible which is repugnant to a former admission of the claimant, and which cannot consistently stand with such admission; for instance, a person having admitted that a certain article was the property of another, cannot afterwards claim such article on the plea of his having purchased it at a period antecedent to that of his having made the admission; nor can a person, having adduced a claim to property, either in virtue of purchase or of inheritance, subsequently claim the same property in virtue of alleged gift, though if the claim in virtue of gift had been prior

in point of date, a subsequent claim, either of purchase or of inheritance, would have been maintainable.*

If a person claim the proprietary right to any thing, specifying a date from which his right began to accrue, and the party in possession plead proprietary right in virtue of purchase, also specifying a date from which his right began to accrue, for instance, if A sue B for a house in the possession of B, stating that he (A) acquired the right to it a year ago, and B adduce evidence to prove that he purchased it from C two years ago, this evidence will not avail B, because he merely stands in the place of C, whose proprietary right to the house it is necessary to prove before the transfer can acquire validity; and inasmuch as the possession of the purchaser rests on the same title as that of the seller, the case is the same as if A had sued C originally; in which case the evidence of A would have been entitled to preference; it being a maxim in law, that evidence is wanting to prove a right not *primâ facie* apparent, and between the person in possession and the person out of possession, the evidence of the latter is entitled to preference, his title not being *primâ facie* the more apparent. This rule is universally admitted to apply if A and B had not specified dates, or if they had specified the same date; but if they specified different dates, the evidence of the claimant who asserts the prior date should, according to one opinion, be received in preference, whether he be in or out of possession. If C claim property in the possession of B, which he (B) had purchased from A, alleging that A had

* I did not deem the points of Moohummudan Law, contained in this and the following passages, to be of such prominent importance as to warrant their admission among the principles.

previously farmed or pawned it to him, no action will lie against B until C produce A, and prove his assertion against him; and if A bring an action against B for property in the possession of the latter, and B plead that the property belongs to C from whom he had received it in pledge or the like, this is a sufficient answer to the claim; but if A's claim be founded on any act done by B, for instance, if he alledge that B had stolen or usurped the property, it is not sufficient that B plead his having obtained the property from a third person, because here a specific act is alleged, independently of the question of proprietary right, which is quite distinct; for a person not in possession might be charged with it, whereas, in a claim of proprietary right, an action against the party in possession alone is maintainable. If A sue B for property, of which B is in possession, and B reply that he had purchased it from A himself, analogy would suggest that B be immediately dispossessed of the property, because he admits the fact of the property having belonged to A, and adduces a new claim by purchase on his own account; but by a more favourable construction (which is always preferred to analogy) the rule of practice is, that B should be continued in possession for three days, on security, to enable him to adduce proof of his allegation. If a person being sued for a debt, answer that he owes it, but that it was contracted in gambling, or by other unlawful means, his evidence to this plea should be received, if he have any, and if he have no evidence, his denial on oath should be credited, because his admission of the debt was coupled with a plea which avoided it. In the case of any specific article claimed from the estate of a person deceased, one of the heirs may defend the

suit; but not if the specific article claimed be not in the possession of the heir against whom the action is brought. It is different in the case of a debt, as in such case one heir may defend the suit, even though he may have no assets in his hands. If a person having sold some property to another, afterwards desire to rescind the contract, on the plea of his not having been authorized to make it, his claim is inadmissible; because the fact of his having entered into the contract is proof against him of his admission, either that the property was his own, or that he had due authority to make the sale, and, under such circumstances, he cannot be permitted to adduce evidence which would be repugnant to his own admission; nor can he put the defendant to his oath in this case, it he have no evidence, because the taking of evidence, on the part of the plaintiff, and the administration of an oath to a defendant, are consequent to the admissibility of a claim, but the claim itself is in this instance inadmissible. In cases of deposit, generally, where there is a dispute either about the restoration or the loss of the article deposited, the presumption is in favour of the depositary, and his assertion and the evidence adduced by him are entitled to preference in matters simply of trust, where no responsibility would be incurred in the event of the proof of the allegation; but if the allegation be of such a nature as would leave responsibility attaching to the depositary, notwithstanding the proof of the plea, the evidence which he adduces for his own acquittance should be preferred, but not his assertion; for instance, where there is no evidence, if a depositary were to plead that he had returned the deposit by a member of his own family, his assertion on oath

should be credited, but not if he pleaded that he returned it by a stranger; because, it is lawful for a depositary to entrust a deposit to the members of his own family, but not to strangers. If the proprietor of a deposit desire the depositary to deliver it to his (the proprietor's) brother, and on the brother coming to take it accordingly, the depositary tell him to come again for the purpose of receiving it, and on the brother's return he tell him that the property was lost before he came for it the first time, the presumption will be against the depositary, and he will be responsible for the value of the deposit, from the manifest inconsistency of the latter assertion. If the proprietor of a deposit desire the depositary to deliver it to a third person, and the depositary assert that he had done so, the person specified, and the proprietor both denying his assertion, the presumption will be in favour of the depositary, and his assertion on oath is to be credited; but the third person is nevertheless not to be held responsible. If, however, the proprietor deny having desired that the property should be delivered to a third person, the presumption will be in his favour, his assertion on oath is to be credited, and the depositary should be held responsible. So, also, if the third person admit having received the deposit, but state that he had lost it, and the proprietor deny having commissioned the third person to receive it, the presumption will be in favour of the proprietor, and the depositary will be responsible; nor will he have any remedy against the person to whom he delivered the deposit, unless that person had become his surety for the purpose of indemnification. If a creditor send a third person to his debtor to receive the amount of the debt due to him, and the messenger having realized

the amount from the debtor, allege that he had paid it over to the creditor, and the creditor deny having received the amount, in this case the presumption will be in favour of the messenger, whose assertion on oath should be credited, and the debtor should be freed from his obligation; but if the messenger, having received the amount from the debtor, allege that he lost it on his way back to the creditor, the loss will fall on the debtor; because it was at his option to trust or not to trust the messenger sent by the creditor, whose property it cannot be said to be, until it come to hand. If a person, with whom property was left in deposit, assert that he gave it back to the proprietor at a certain place on a certain day, in this case it is not permitted to the proprietor to bring evidence that the depositary, on the day indicated, was not at the place where he alleged the re-delivery to have occurred; but he may bring evidence to the fact of the depositary's having acknowledged that he was at another place. If a borrower and lender (of a horse for instance) dispute as to the time for which it was to be lent, or the place to which it was to go, or the burden which it was to carry, the presumption is in favour of the lender, and his assertion on oath should be credited; and if a borrower have used articles borrowed, in a certain way, and plead that he had the permission of the lender, who denies the assertion, in this case, also, the presumption is in favour of the lender, and the borrower will be answerable for any damage sustained, unless he can adduce evidence to prove the permission of the lender.

If a person claim property, on the plea that he had deposited it with another, and the defendant deny having the deposit, and the claimant afterwards adduce evidence

to prove that he had actually deposited the property with the defendant, it is still open to the defendant to plead that the deposit was destroyed or returned; because these two pleas can both consistently stand, but he cannot plead under such circumstances that he never received the deposit, as that would contradict what had already been proved. The answer of a defendant, though proved, may be repelled in certain cases by the rejoinder of the plaintiff; for instance, if a person sue another for a debt, and the defendant plead that the plaintiff had remitted it, and prove such plea, and the plaintiff subsequently bring forward evidence to prove that the defendant acknowledged the debt, he will be compelled to pay, if he made no mention of the acknowledgment in his answer, as then the remission may be presumed to have been made on account of another debt; but it is sufficient for a defendant to prove that the plaintiff, who claims property in his (the defendant's) possession, had solicited the gift of such property.

Similarity of hand-writing is not much respected as evidence;* for instance, if a man sue another for a debt, producing a written acknowledgment, which the defendant denies, the claim should not be adjudged on proof of similitude of hand-writing, but if the defendant admit his hand-writing, but deny all knowledge of the contents of the document, he should not be credited, supposing the tenor of the writing to be plain, familiar, and such as is used in epistolary correspondence. The

* Note Comparison of hand writing has been legalized by Sec. xlviii, Act II of 1855 q. v.—Ed.

defendant will also be responisible, if the document be drawn up in legal form, such as a bond or other obligation, and if he called persons to witness that he had signed to the declaration therein contained. If a man execute a document in the presence of others, and read it to them, they are competent to bear evidence against the obligor, whether he desired them to be witnesses or not; but even though desired, they are not competent witnesses, if they are ignorant of the contents of the document. It is a general rule that the entries in bankers' books should be received as good evidence.*

These specimens will suffice, as a general outline of the Moohummudan Law of pleadings and evidence, to show that its principles are consistent with equity and good sense. It will be seen that its rules are in unison with those of the most approved systems of jurisprudence, and that, that most equitable of all maxims "*melior est conditio defendentis*" receives its due consideration. Their preference of male to female evidence (which by the bye is not peculiar to this code†) and other irrational distinctions are, of course, not attended to in the practice of our Courts.

I shall conclude these remarks with a few observations on the Moohummudan Law of bailment; and first of that description of bailment which is termed deposit. This is defined to be the delivery of property to another for the

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* Vide Secs. xl and xliii Act. II of 1855.—Ed.

† The testimony of women is always received when it is *necessary*, *i. e.* when the fact cannot be proved without them; and it is seldom admitted where other witnesses can be had.—Erskine's Principles of the Scottish Law, page 475.

purpose of preservation; which property becomes a trust in the hands of the bailee, who is not responsible in case of loss.* The reason of the rule in favour of depositaries is thus given in the *Futawa-i-Hummadee*. His undertaking to preserve the property for the proprietor is a gratuitous act of kindness, which should not involve responsibility; and although the permitting a loss which can be avoided, certainly implies a deficiency of caution, yet, entire exemption from culpability is not necessary, in this instance, as it is in a contract mutually beneficial.† This however is the general rule, to which there are undoubtedly exceptions. A depositary cannot legally entrust the deposit to the care of a stranger. He should not retain it after the proprietor has required him to deliver it up. He should not fraudulently deny his possession of it, or mix it with his own property so that it becomes undistinguishable, nor should he transgress his authority by making beneficial use of the property deposited.‡ In all these instances he will be responsible for

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* This definition nearly agrees with that of the Civil Law.

Depositum est quod custodiendum alicui datum est.—Pandect. Justin. lib. xvi, tit. iii. culpæ autem nomine, id est desidiæ ae negagentiæ, non tenetur. Inst. lib. 3, tit. xv, §§ iii.

† *Consonat quod ait Ulpianus.* Nunc videndum est quid veniat in commodati actionem; utrum dolus an et culpa, an vero et omne periculum. Et quidem in contractibus interdum dolum solum; interdum et culpam præstamus. Dolum in deposito: nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus; nisi forte et merces accessit.—Justin. Dig. lib. xiii, tit. vi, sec. 2, §§ xii.

‡ These provisions nearly correspond with three of the six species of deceit enumerated in the Code of Justinian, "De variis speciebus doli ex quibus actio depositi nascitur. Prima species; si depositum non reddatur statim. Secunda; si reddatur res dolo depositarii deterior facta. Quinta: si dolo depositarius rem habere desierit. Lib. xvi, tit. 3, s. 2.

any loss that may accrue. A depositary will also be considered guilty of transgression if, having been forbidden so to do, he carry the deposit on a journey, or if he unnecessarily take it to a place where danger may be apprehended; and, even though the proprietor may not have forbidden the removal of the deposit, if it be of such a nature as that its carriage would be attended with expence. In all these cases he is held responsible. Gross negligence also induces responsibility, but in order to ascertain what constitutes such negligence, the customs of the place at which the transaction occurred should be taken into consideration. For instance, the case was put of a depositary, who, having placed the deposit in the chamber of an inn, to which there was a common court-yard, went out, having fastened the door with a string, but not having locked it. In his absence the deposit was stolen. Here, in order to determine whether the depositary should or should not be responsible, it must be ascertained whether the mode of securing the door, which he adopted, was considered generally safe at the place, or whether it was usual to lock the door.

The above rules are equally applicable to every description of bailee, with the exception of that relative to the removal of the property bailed, which does not apply strictly to carriers.

Hire or *locatio*, is, according to the Moohummudan Law, defined to be a contract of usufruct for a return.* "A contract of hire is not valid unless both the usufruct and

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* Locatio conductio est contractus, quo de re fruendâ, vel faciendâ, pro certo precio convenit. Pand. Justin. lib. xix, tit. ii.

the hire be particularly known and specified. Whatever is lawful as a price, is lawful also as a recompense in hire; because the recompense is a price paid for the usufruct, and is therefore analogous to the price of an article purchased. The extent of usufruct may be defined by fixing a term; as in the hire of a house for the purpose of residence, or the hire of land for the purpose of cultivation. A contract of hire, therefore, stipulated for a certain term, to whatever extent, is valid; because upon the term being known, the extent of the usufruct for that term is also known. Usufruct may also be ascertained by a specification of work, as where a person hires another to dye or sew cloth for him, or an animal for the purpose of carrying a certain burden, or of riding upon it a certain distance. Usufruct may also be ascertained by specification and pointed reference; as where a person hires another to carry such a particular load to such a particular place:" In these examples we find the three subdivisions of this bailment, as laid down by Sir Wm. Jones, the *locatio conductio rei;* the *locatio operis faciendi* and the *locatio mercium vehendarum.* With respect to the first subdivision, I cannot find that the Moohummudan Law makes any distinction between the responsibility of an hirer and that of a borrower. But with respect to the two last, the distinction laid down by Sir Wm. Jones, that where skill is required, as well as care, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for a due application of the art, and the distinction between common carriers and other individuals seem to have been adopted also by the Moohummudan Law. Thus if a thing perish in the hands of a common carrier, while performing his work, he is res-

ponsible; but not otherwise:* so also, if a tailor, in the exercise of his trade, spoil the cloth entrusted to him, he will be responsible for the value of it;† but if it be damaged or lost, not by means connected with the exercise of his trade, the tailor would not be held responsible; thus, for instance, though the cloth was stolen from his house, at a period subsequent even to the day on which he had engaged to redeliver it, no responsibility will attach to him.

"Actions against mandataries," Sir William Jones observes, "are indeed very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation.*" This reason, I fear, loses none of its weight among the orientals, and I have not met with any provisions, in their law books, which supposes the possibility of such an undertaking.

On the subject of that species of bailment which is termed *commodatum* or loan for use, I do not find that there is much difference of opinion between the Moohummudan and the Roman or the English laws.‡ The definition given of it in the *Shurhi viqaya*, and in the Digest of Justinian is the same; except that, agreeably to the former

* The first of these examples seems to coincide with the doctrine of Ulpian, as laid down in the Pandects, and the second to oppose it; "Si quis vitulos pascendos, vel sarciendum quid poliendum ve conduxit culpam eum præstare debere, at quod imperitiâ peccavit; culpam esse. Quippe ut artifex (inquit) conduxit." Lib. xix, de loc. con.

† Si fullo vestimenta polienda acceperit, eaque mures roserint; ex locato tenetur quia debuit ab hac re cavere. Et si pallium fullo permutaverit et alii alterius dederit; ex locato actione tenebitur etiamsi ignarus fecerit.

‡ Commodatum est contractus quo res gratis utenda datur ad tempus. Lib. xiii, tit. vi.

law, I do not find that any slighter degree of negligence imposes greater responsibility on a borrower than on a hirer or a depositary.* If a person borrow an animal from another, without any specification of time or place, or of the burthen which it is to carry, the borrower may take it wheresoever he pleases, and load it with whatever he thinks proper.

If the conjecture of Sir William Jones be correct, the Moohummudan Law agrees with the Mosaic in its provisions relative to the responsibility attached to a borrower, who is responsible in case of loss, should he at the time be out of sight of the thing borrowed.† For instance, if a person borrow a horse and enter a house, leaving the horse in the street so as to lose sight of it, and it be lost, the borrower will be responsible for its value. This species of loan also is distinguished from the *mutuum* or loan for use ;‡ in which species of bailment,

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* A loan is a trust, and if it perish without transgression (on the part of the borrower) he is not responsible.

† "By the Law of Moses, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence*, or the *presence* of the owner: for, says the divine legislator, "if a man borrow aught of his neighbour, and it be hurt or die, *the owner thereof* not *being with it*, he shall surely make it good; but if the *owner* thereof be with it, he shall *not* make it good:' now it is by no means *certain*, that the original word signifies the *owner*, for it may signify the *possessor*, and the law *may* import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed."

‡ I call it after the French lawyers, *loan for use*, to distinguish it from this loan for consumption, or the *mutuum* of the Romans; by which is understood the lending of *money*, *wine*, *corn*, and other things that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity.—Law of Bailments.

according to the Moohummudan Law, also, the value of the loan must be restored, whatever accident may happen to the borrower; contrary to the case of a loan for use.*

A pledge is defined to be the giving a thing in security for the satisfaction of some right, such as a debt.† A pawnee may either watch over the pledge himself, or he may devolve the care of its preservation upon his wife, child, or servant, provided he be of his family. If, on the contrary, he commit the care of it, or resign it in trust, to one who is not of his family, he becomes the security. "If a pawnee commit any transgression with respect to the pledge, he must make reparation to the whole amount of the value; in the same manner as in a case of usurpation; for the amount in which the value of the pledge exceeds the debt is a trust; and a transgression with respect to a trust, renders the person who commits it liable to make complete reparation. A pledge is insured in the possession of the pawnee to whatever is the smallest amount the debt of the pawnee, or the value the pledge bore at the time of its being deposited. Thus, if a pledge, equivalent to the amount of the debt, perish in the pawnee's hands, his claim is rendered void, and he thereby, as it were, obtains a complete payment. If, on the contrary,

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* The loan of *dirms* and *deenars*, and of articles estimated by *measurement of capacity*, by *weight*, or by *tale*, is considered in the light of *karz*.—The principle on which this proceeds is, that *Areeat* is an investiture with the use (of the property lent;) and as this cannot be obtained, with regard to these articles, without a destruction of the substance, it must, with respect to them, be necessarily considered as an investiture with the substance.—Now an investiture of this nature is to be considered in two lights, a gift or a loan.—*Hidaya.*

† Pignus est jus creditori in re constitutum quo licet ei illum possidere in securitatem debiti; eamque distrahere, ut ex pretio debitum consequator. Pand. Justin. lib. xx, De pignoribus, &c.

the value of the pledge exceed the amount of the debt, the excess is in that case considered as a *trust,* and the whole of the pawnee's claim is annulled, on account of the decay of that part of the pledge which is equivalent to the amount thereof; and the remainder (the excess), as being held in trust, is not liable to be compensated for, and consequently the pawner sustains the loss of it. If, on the other hand, the value of the pledge be *less* than the debt, the pawnee forfeits that part of his claim only which is equal to the value of the pledge, and the balance, or excess, must be paid to him by the pawner."

From the above observations it will be seen that simple depositaries and (by parity of reasoning) mandataries, are responsible only in case of transgression or gross negligence, the former consisting in disobeying the injunctions of the bailor; in unnecessarily exposing the property bailed to danger; in refusing to deliver up possession of it; in confiding the care of it to a stranger, or other overt acts of a similar nature which imply wilful wrong; the latter in that total deficiency of care, which amounts to gross negligence, and which must be judged of according to the circumstances of each case; that a borrower for use, and a hirer (regarding whom the law is the same), are responsible under similar circumstances, with this additional provision, that, in the case of hired or borrowed cattle, the bailee will be responsible, if, at the time of their being lost, they were out of his sight, this being *primâ facie* evidence of gross negligence; that persons hired to perform any work, or to carry goods from one place to another, will be responsible under similar circumstances, with this additional provision, that, in the case of professional workmen and common carriers, if damage or loss accrue to the property bailed, in the

exercise of their vocation, it will be attributed to gross negligence; that a pawnee is answerable, under similar circumstances, for the whole value of the pledge; that if the pledge be lost by any means, his debt is extinguished, if the property pawned equal or exceed it in value; and that a borrower for consumption is answerable at all events.

Now I cannot help being of opinion that the whole of this doctrine is consistent with reason and good sense. The law, as laid down by Sir Wm. Jones, is, that "a pawnee shall not be discharged, if the pawn be simply *stolen* from him, but if he be forcibly robbed of it, *without his fault*, his debt shall not be extinguished. He admits that this species of bailment is beneficial to the *pawnee* by securing the payment of his debt, and to the *pawner* by procuring him credit. In other words, the contract is mutually and reciprocally advantageous. Surely then the contracting parties ought each to be subjected to the same liabilities, and it ought to follow, as a necessary consequence, that if the borrower was robbed of the money, the pawnee should lose his debt. This, however, I do not find to be any where admitted. The reason of the rule in favour of the pawnee seems to be the same as that which is assigned for making a distinction between the borrower for use and the borrower for consumption, and rendering the latter liable in a case where the former is not; which is, that when money, and other things capable of valuation by number, weight, or measure, are lent for consumption, they are to be restored only in equal value or quantity; and these things, say the civilians, *nunquam pereunt:** whereas, in loans for use, the arti-

* Ratio disparitatis est quod; qui rem utendam accipit ejus rei in specie debitor est: porro obligatio extinguitur rei debitæ interitu. At

cles are to be re-delivered specifically, and *therefore* the owner must abide the loss if they perish through inevitable accident. Now the argument seems rather more specious than solid. Would it not be more equitable, as the specific things connot be re-delivered, to cause their value to be restored? By the opposite doctrine this apparent anomaly is introduced, that a borrower for use, who has the entire and exclusive benefit of the articles borrowed, shall not be responsible for an accident, which, occurring with a pawner (who is only a participator with the pawnee in the benefit of the transaction) would render him answerable. Suppose the case of a man who, having five pieces of money which (as being the gift of a relation, or from any other cause) he is unwilling to exchange, were to borrow five pieces from another individual and to leave his own five with the lender in pledge, and both the pawner and pawnee were to be robbed of the money borrowed and the money pledged in the same night, does it not appear rather hard that the pawner (who perhaps derived the least benefit from the transaction) should be subjected to the entire loss? The following case has been cited by Sir Wm. Jones; " *Zaid* had left with *Amru* divers goods in pledge for a certain sum of money, and some *ruffians* having entered the house of Amru took away his own goods together with those pawned by Zaid. And the question was, whether, *since the debt became extinct by the loss of the pledge*, and since the goods pawned exceeded in value the amount of the debt, *Zaid* could legally demand the balance of Amru. To which question the great law officer of the

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is qui nummum accepit non nummum quos accepit in specie debitor est, sed generis et quantitatis quæ nunquam percunt.—Note to Pand. Justin. De actione commodati directâ.

Othman court answered, with the brevity usual on such occasions, Olmaz, it cannot be." Upon this Sir Wm. Jones observes, "we must necessarily suppose that the Turks are wholly unacquainted with the imperial laws of Byzantium, and that their own rules are repugnant to natural justice." Now it is, obviously, to the question that the objection is made, and not to the answer, which is indubitably right, as far as it goes. But where is the repugnancy to natural justice in declaring the debt to be extinct on the loss of the pledge? Would it not be more repugnant to justice to make the borrower pay a debt for which he had already given more than ample satisfaction? And where is the hardship sustained by the lender? According to the doctrine contained in the law of bailments, if the lender had retained his money, and had derived no benefit from putting it out to interest on good security, he would have suffered *damnum absque injuriâ*; but having derived such benefit, he can come upon the borrower, who derived only equal, perhaps not so great benefit from the transaction. This would indeed be inconsistent, and, in my humble judgment, not easily reconcileable with natural justice.* I should apprehend

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* I find the following passage in the law of bailments, "It may be right also to mention that the distinction before taken, in regard to *loans*, between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing*: in the first case it is a regular *bailment*, in the second it becomes a *debt*. Thus, according to Alfenus in his famous law, on which the judicious Bynkershoek has learnedly commented, If an ingot of silver be delivered to a silversmith to make an urn, the *whole* property is transferred, and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape: the smith may conse-

it is not the usage in Turkey, as Sir Wm. Jones conjectures, to stipulate that "*amissio pignoris liberet debitorem*" such stipulation being expressly declared by the Moohummudan Law, null and void.*

As I undertook to furnish a brief outline of the Moohummudan law of bailments, I could not have omitted that part of it which relates to pawnees. The doctrine in question militates with that laid down in the law of bailments as expounded by Sir Wm. Jones, and it is therefore not without considerable reluctance that I have treated of the subject; but my fondness (which I am not ashamed to avow) for the *Moosulmaun* Law, induced me to become its humble advocate in the present instance.

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quently apply it to his own use; but if it perish, even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time: It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agreed to be specifically re-delivered in the form of a cup or a standish." Now I must confess that I am dull enough not to see the justice of this law. It is true, that if the specific thing perish it cannot be restored, but where is the reason why the value of it should not be made good. The loss to the bailor is equal, perhaps greater, when the thing bailed is to be returned specifically; and the culpability, if any, on the part of the bailee, is, in either case, the same.

* A pawner and pawnee agree that if the pledge be lost, its loss shall not be attended with any responsibility; it shall not be so, but the debt becomes extinguished also. If a person give a thing in pledge to another, and the pawnee say to the pawner; I receive this thing on condition that, if it be lost, the loss shall not be attended with responsibility; and the pawnee assent, the pledge is allowable, but the condition is void. *Futawa-i-Hummadee.*

In compiling the principles of law contained in this work, I have had recourse to none but the most approved authorities, and I have appended to this work extracts from the original Arabic,* to vouch for the accuracy of the doctrines I have laid down.† I have taken care to note any material difference of opinion which I have discovered in these authorities. The precedents consist of legal expositions, which have been actually delivered in the several courts of justice. I have selected such as appeared to me of the greatest importance, and those which seemed to embrace doctrinal points most likely to recur. With a view to retain the sense, as far as practicable, I have left them in the original shape of question and reply; and none have been admitted but such as appeared to me

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* Omitted in this Edition.—Ed.

† I should observe, however, that I purposely avoided consulting books in the first instance, and this I did with a view of avoiding technicalities as much as possible, and where my own knowledge or memory of the law failed me, I generally had recourse to living authorities, referring to books only for the purpose of verification. This will of course occasion considerable dissimilarity in the letter of the rules as they appear in the original and in my compilation, but their spirit I trust has been uniformly preserved. Another cause of dissimilarity is, that some of the principles here laid down are founded on the absence rather than the existence of rules. For instance, I have laid it down as a principle that there is no distinction between real and personal, nor between ancestral and acquired property in the Moohummudan law of inheritance, and this is deduced from the invariable use in the original Arabic of the word ترکه which includes all descriptions of property. The same observation is applicable to the doctrine laid down respecting primogeniture and a few other instances. I have moreover taken the liberty of introducing what I considered more apposite examples on the doctrine of successions, whenever I conceived that an improvement might be made to the illustrations adduced in the *Sirajya* or *Shureefeea*.

(assisted by all the legal talent I could procure) to admit of no doubt as to their accuracy.

By hazarding some of the preceding observations I am aware that, I may have subjected myself to the rigour of criticism, and, if inflicted, I shall have no reason perhaps to complain. My only defence is, that the active occupations of an official life in India leave but little leisure for literary research; that to cultivate the fields of science, or to mature the fruits of reflection, undisturbed retirement is necessary; and that no more than superficial knowledge and crude conceptions, on any subject unconnected with his immediate profession, can be expected from a man of ordinary capacity, whose time is perpetually absorbed in the dry and distracting details of ministerial duty.

I have no presentiment of fear, however, as to the reception which the following pages will meet with from the liberality and indulgence of the judicial officers for whose benefit they were chiefly intended; and if this book should prove the means of averting one atom of wrong from those who sue for justice, or one moment of anxiety from those who dispense the laws, I shall not consider unprofitable the time that has been occupied, and the labour that has been exerted.

PRINCIPLES

OF

Moohummudan Law

RELATIVE TO

INHERITANCE, CONTRACTS, AND MISCELLANEOUS SUBJECTS.

CHAPTER I.

PRINCIPLES OF INHERITANCE.

SECTION I.

General Rules.

1. THERE is no distinction between real and personal, nor between ancestral and acquired property, in the Moohummudan Law of Inheritance. Property of all kinds inheritable without distinction.

2. Primogeniture confers no superior right. All the sons, whatever their number, inherit equally. Of Primogeniture.

3. The share of a daughter is half the share of a son, whenever they inherit together. Of the right of a daughter, with a son.

4. A will made in favour of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons, or the other heirs. Of legacies in favour of heirs.

5. Debts are claimable before legacies, and legacies (which however cannot exceed one-third of the testator's estate) must be paid before the inheritance is distributed. Of debts and legacies.

6. Slavery, homicide, difference of religion and difference of allegiance, exclude from inheritance. Causes of exclusion from inheritance.

7. But persons not professing the Moohummudan faith may be heirs to those of their own persuasion, and in the Exceptions.

case of persons who are of the Moohummudan faith, difference of allegiance does not exclude from inheritance.

Simultaneous succession of a plurality of heirs.

8. To the estate of a deceased person, a plurality of persons having different relations to the deceased, may succeed simultaneously, according to their respectively allotted shares, and inheritance may partly ascend lineally, and partly descend lineally at the same time.

No right by representation.

9. The son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B and C are grandfather, father and son. The father B dies in the life-time of the grandfather A. In this case the son C shall not take *jure representationis*, but the estate will go to the other sons of A.

Sons, son's sons, &c. have no specific allotments; but their portions vary according to the number of the other heirs.

10. Sons, son's sons and their lineal descendants, in how low a degree soever, have no specific share assigned to them: the general rule is that they take all the property after the legal sharers are satisfied, unless there are daughters; in which case each daughter takes a share equal to half of what is taken by each son. For instance, where there are a father, a mother, a husband, a wife and daughters, but little remains as the portion of the sons; but where there are no legal sharers nor daughters, the sons take the whole property.

Enumeration of heirs not liable to exclusion.

11. Parents, children, husband and wife must, in all cases, get shares, whatever may be the number or degree of the other heirs.

General Rule for the shares

12. It is a general rule that a brother shall take double the share of a sister. The exception to it is in the case of

brothers and sisters by the same mother only, but by different fathers. of brothers and sisters.

13. The portions of those who are legal sharers only, and not residuary heirs, can be stated determinately, but the portions receivable by those who are both sharers and residuaries cannot be stated generally, and must be adjusted with reference to each particular case. For instance, in the case of a husband and wife, who are sharers only, their portion of the inheritance is fixed for all cases that can occur; but in the case of daughters and sisters who are, under some circumstances, legal sharers, and under others residuaries, and in the case of fathers and grandfathers who are, under some circumstances, legal sharers only, and under others, residuaries also, the extent of their portions depends entirely upon the degree of relation of the other heirs and their number.* Of shares who are not residuary heirs. Of sharers who are residuary heirs.

SECTION II.

Of Sharers and Residuaries.

14. The widow takes an eighth of her husband's estate, where there are children or son's children, how low soever, and a fourth where there are none. Share of the widow.

15. The husband takes a fourth of his wife's estate, where there are children or son's children, how low soever, and a moiety where there are none. Share of the husband.

16. Where there is no son and there is only one daughter, she takes a moiety of the property as her legal share. Share of the daughter.

* Daughters without sons are legal sharers, and so are sisters without brothers, but with them they become merely residuaries. Grandfathers and fathers with sons, son's sons, &c. are legal sharers, but, with daughters only, they are residuaries, as well as legal sharers.

Share of two or more daughters. 17. Where there is no son, and there are two or more daughters, they take two-thirds of the property as their legal share.

Share of the son's daughters. 18. Where there is no son, nor daughter, nor son's son, the son's daughters take as the daughters, namely, a moiety is the legal share of one, and two-thirds of two or more.

Of the same. 19. Where there is one daughter, the son's daughters take a sixth, but where there are two or more daughters they take nothing.

Of the same. 20. Where there is a son's son, however, or a son's grandson, the son's daughters take a share equal to half of what is allotted to the grandson or great grandson.

Of brothers and sisters. 21. Brothers and sisters can never take any share of the property, where there is a son or son's son, how low soever, or a father or grandfather.*

Of the same. 22. Where there are uterine brothers, the sisters each take a share equal to half of what is taken by the brothers; and they being then residuaries, the amount of their shares varies according to circumstances.

Of the same. 23. In default of sons, son's sons, daughters and son's daughters, where there is only one sister and no uterine brother, she takes a moiety of the property.

Of the same. 24. In default of sons, son's sons, daughters and son's daughters, where there are two or more sisters and no uterine brother, they take two-thirds of the property.

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* It is the orthodox opinion that the grandfather excludes brethren of the whole blood and those by the same father only. Among the Schias, who adhere to the doctrine of the two disciples, the contrary opinion is maintained. The "terms grandfather" and "grandmother" are intended to include all ancestors, in whatever degree of ascent, between whom and the deceased no female intervenes.

25. Where there are daughters or son's daughters and no brothers, the sisters take what remains after the daughters or son's daughters have realized their shares: such residue being half, should there be only one daughter or son's daughter, and one-third should there be two or more. Of the same.

26. A distinction is made between the two descriptions of half brothers and half sisters. Half brothers and half sisters, who are by the same father only, can never inherit a half brother's estate while there are both brothers and sisters by the same father and mother, but those by the same mother only, do inherit with brethren of the whole blood. Of half brothers and half sisters. Of those by the same father only. Of those by the same mother only.

27. Where there is only one sister by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take one-sixth as their legal shares. Of half sisters by the same father only.

28. Where there are two or more sisters by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take nothing. Of the same.

29. Where however the half sisters by the same father only, have an uterine brother, they each take a share equal to *half* of what is allotted to him. Of the same.

30. Among brothers and sisters by the same mother only, difference of sex makes no distinction in the amount of the shares, contrary to the case of brothers and sisters by the same father and mother, and brothers and sisters by the same father only; but the general rule of a double share to the male applies to their issue. Brothers and sisters by the same mother only inherit equally; but the general rule of a double share for the male applies to their issue.

31. Where there is one brother by the same mother only, or one sister by the same mother only, his or her share is Of a half brother and a

half sister by the same mother. one-sixth, provided there are no children of the deceased nor son's children, nor father, nor grandfather, and where there are two or more children by the same mother only, their share is one-third.

Of two or more.

Of the father. 32. Where there is a son of the deceased, or son's son, how low soever, the father will take one-sixth.

Of the mother. 33. Where there are children, or son's children, how low soever, or two or more brothers and sisters, the mother will take one-sixth.

Of the same. 34. Where there are no children, nor son's children, and only one brother or sister, the mother will take one-third with a widow or a widower, if she have a grandfather to share with instead of a father; but a third of the remainder only, after the shares of the widow or widower have been satisfied, if there be a father to share with her.

Of the grandfather. 35. Grandfathers can never take any share of the property where there is a father.

Share of. 36. Where there is a son of the deceased or son's son, how low soever, and no father, the grandfather will take one-sixth.

Of the grandmother. 37. Grandmothers can never take any share of the property where there is a mother, nor can paternal grandmothers inherit where there is a father.

Of paternal female ancestors. 38. Paternal female ancestors of whatever degree of ascent are also excluded by the grandfather, except the father's mother; she not being related through the grandfather.

Exception.

Share of grandmothers. 39. The share of a maternal grandmother is one-sixth, and the same share belongs to the paternal grandmother where there is no father.

40. Two or three grandmothers being of equal degree, share the sixth equally. Of two or more grand. mothers.

41. But grandmothers who are nearer in degree to the deceased, exclude those who are more distant. The nearer exclude the more distant.

42. A maternal grandfather and the mother of a maternal grandfather are not entitled to any specific share, they being termed false ancestors, and not included in the number of sharers or residuaries. Of false ancestors.

SECTION III.

Of distant kindred.

43. Where there is no son, nor daughter, nor son's son, nor son's daughter, however low in descent, nor father, nor grandfather, nor other lineal male ancestor, nor mother, nor mother's mother, nor father's mother, nor other lineal female ancestor, nor widow, nor husband, nor brother of the half or whole blood, nor sons, how low soever, of the brethren of the whole blood or of those by the same father only, nor sister of the half or whole blood, nor paternal uncle, nor paternal uncle's son, how low soever, (all of whom are termed either sharers or residuaries),* the daughter's children and the children of the son's daughters succeed; and they are termed the first class of distant kindred. Of the first class of distant kindred.

44. In default of all those above enumerated, the grandfathers and grandmothers of that description, who are nei- Of the second class.

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* Of the persons here enumerated the following males are legal sharers, namely, the father, the grandfather or other lineal male ancestor, the husband and the brother of the half blood by the same mother only, and the following females, namely the daughter, the son's daughter, the widow, the mother, the grandmother, the sister by the same father and mother, the sister by the father only and the sister by the same mother only. The shares of these persons vary according to circumstances, and in particular instances some of them (as has been shown) are liable to exclusion altogether. The rest of the persons enumerated are residuaries only, and have no specific shares.

ther sharers nor residuaries, succeed; and they are termed the second class of distant kindred.

Of the third class.

45. In their default the sister's children, and the brother's daughters, and the sons of the brothers by the same mother only, succeed; and they are termed the third class of distant kindred.

Of the fourth class.

46. In their default the paternal aunts and uncles by the same mother only, and maternal uncles and aunts succeed; and they are termed the fourth class of distant kindred.

Of their children.

47. In their default the cousins, that is, the children of paternal aunts and uncles by the same mother only, and of maternal uncles and aunts succeed.

Exception in the case of an enfranchised slave.

48. There is an exception to the above general rules, relative to the succession of distant kindred after residuaries. If the estate to be inherited belonged to an enfranchised slave, his manumittor and the heirs of such manumittor inherit, in preference to the distant kindred of the deceased.

Rules for the succession of the first class.

49. The rule with regard to the succession of the first class of distant kindred is, that they take according to proximity of degree, and when equal, those who claim through an heir have a preference to those who claim through one not being an heir. For instance, the daughter of a son's daughter and the son of a daughter's daughter are equi-distant in degree from the ancestor; but the former shall be preferred, by reason of the son's daughter being an heir, and the daughter's daughter not being an heir: if there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but the sexes of the ancestors differ in any stage

of ascent the distribution will be made with reference to such difference of sex; regard being had to the stage at which the difference first appeared: for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daughter; because one of the ancestors of the former was a male, whose portion is double that of a female.*

50. The succession also, with regard to the second class of distant kindred, is regulated nearly in the same manner, by proximity, and by the condition and sex of the person through whom the succession is claimed when the claimants are related on the same side; when the sides of relation differ, two-thirds go to the paternal, and one to the maternal side, without regard to the sex of the claimants.† For the succession of the second class.

51. The same rules apply with regard to the third as to the first class of distant kindred; for instance, the brother's son's daughter and the sister's daughter's son are equi-distant in degree from the ancestor; but the former shall be preferred by reason of the brother's son being a residuary heir, and where they are equal in this respect the rule laid down for the first class is applicable to this. For the succession of the third class.

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* The opinion of Aboo Yoosuf is that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants and not to the sexes of their ancestors. But this, although the most simple, is not the most approved rule.

† The rule may be thus exemplified. The claimants being a maternal grandfather and the mother of a maternal grandfather, the former being more proximate excludes the latter; but suppose them to be the father of a maternal grandfather and the mother of a maternal grandfather: here the claimants are equal in point of proximity; the side of their relation is the same and they are equal with respect to the sex of the person through whom they claim, and in this case the only method of making the distribution is by having regard to the sexes of the claimants and by giving a double share to the male.

For the succession of the fourth class.

52. With regard to the fourth class all that need be said is, that (the sides of relation being equal) uncles and aunts of the whole blood are preferred to those of the half, and those who are connected by the same father only are preferred to those by the same mother only. Where the strength of relation is also equal, as, for instance, where the claimants are a maternal uncle and a maternal aunt, of the whole blood, then the rule is, that the male shall have a share double that of the female. Where however one claimant is related through the father only, and the other is related through the mother only, the claimant related through the father shall exclude the other if the sides of their relation are the same; for instance, a maternal aunt by the same father only, will exclude a maternal aunt by the same mother only; but if the sides of their relation differ; for instance if one of the claimants be a paternal aunt by the same father and mother, and the other be a maternal aunt by the same father only, no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation.

For the succession of their children.

53. The succession of the children of the above class, that is, the cousins, is regulated by the following rules:—propinquity to the ancestor is the first rule. Where that is equal, the claimant through an heir inherits before the claimant through one not being an heir, without respect to the sex of the claimants; for instance, the daughter of a paternal uncle succeeds in preference to the son of a paternal aunt—unless the aunt is related on both the father's and mother's sides, and the relation of the uncle be by the same mother only. But where the son of a paternal aunt by the same father and mother, and the son of a maternal aunt by the same father and mother, or by the same father only, claim together, the latter will not be excluded by the former;

the only difference is, that two-thirds are the right of the claimant on the paternal side, and one-third that of the claimant on the maternal side. Should there be no difference between the strength of relation, the sides or the sexes of the persons through whom they claim, regard must be had to the sexes of the claimants themselves.

54. In the distribution among the descendants of this class, the same rule is applicable as to the descendants of the first class; for instance, the two daughters of the daughter of a paternal uncle's son will get twice as much as the two sons of the daughter of a paternal uncle's daughter, supposing the relation of the uncles to be the same, and in case of equality in all other respects regard must be had as above, to the sexes of the claimants.* For the succession of the descendants of their children.

55. In default of distant kindred, he has a right to succeed whom the deceased ancestor acknowledged conditionally, or unconditionally, as his kinsman: provided the acknowledgment was never retracted, and provided it cannot be established that the person in whose favour the acknowledgment was made belongs to a different family. Of those who succeed in default of distant kindred.

* In considering the doctrine of succession of distant kindred attention must be paid to the following points. First, their relative distance in degree of relation from the deceased, whether a greater or lesser number of degrees removed. Secondly, it must be ascertained whether any of the claimants are the children of heirs. If so preference must be shown to such children; Thirdly, their strength of relation, whether they are of the half or whole blood; Fourthly, their sides of relation whether connected by the father's or mother's side; and Fifthly, the sexes of the persons through whom they claim, whether male or female. With respect to this latter point however a difference of opinion exists; it being maintained by some authorities that *cæteris paribus* no regard should be had to mere sex of the person through whom the claim is made, but that the adjustment should be made according to the sex of the claimants themselves. But the contrary is the more approved doctrine. It should be recollected too, that, whenever the sides of relation differ, those connected through the father are entitled to twice as much as those connected through the mother, whatever may be the sexes of the claimants.

Of the Public Treasury.

56. In default of all these, there being no Will, the property will escheat to the Public Treasury ; but this only where no individual has the slightest claim.

SECTION IV.

Primary Rules of Distribution.

Rule where the shares are a half and a fourth.

57. Where there are two claimants, the share of one of whom is half, and of the other a fourth, the division must be made by four ; as in the case of a husband and an only daughter, the property is made into four parts, of which the former takes one and the latter two. The remaining fourth will revert to the daughter.

A half and an eighth.

58. Where there are two claimants, the share of one of whom is half, and of the other an eighth, the division must be made by eight ; as in the case of a wife and a daughter, the property is made into eight parts, of which the daughter takes four and the wife one. The surplus three shares revert to the daughter.

A half, a fourth and an eighth cannot occur together.

59. No case can occur of two claimants, the one entitled to a fourth and the other to an eighth ; nor of three claimants, the one entitled to half, the other to a fourth, and the third to an eighth.

A sixth and a third.

60. Where there are two claimants, the share of one of whom is one-sixth, and of the other one-third ; as in the case of a mother and father being the only claimants, the property is made into six parts of which the mother takes two and the father one as his legal share. The surplus three shares revert to the father.

A sixth and two-thirds.

61. Where there are two claimants, the share of one of whom is one-sixth, and of the other two-thirds ; as in the case of a father and two daughters being the only claimants, the property is made into six parts, of which

the father takes one as his legal share, and the two daughters four. The surplus share reverts to the father.

62. Where there are two claimants, the share of one of whom is one-third, and of the other two-thirds; as in the case of a mother and two sisters, the property is made into three parts, of which the mother takes one and the two sisters two. A third and two-thirds.

63. No case can occur of three claimants, the one entitled to one-sixth, the other to one-third, and the other to two-thirds. A sixth a third and two-thirds cannot occur together.

64. Where a husband inherits from his childless wife, (his share in this case being one-half), and there are other claimants entitled to a sixth, a third, or two-thirds, such as a father, a mother, or two sisters, the division must be by six. A half with a sixth, a third or two-thirds.

65. Where a husband inherits from his wife who leaves children, or a wife from her childless husband (the shares of these persons respectively in these cases being one-fourth), and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be by twelve. A fourth with a sixth, a third or two-thirds.

66. Where a wife inherits from her husband, leaving children, her share in that case being one-eighth, and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be by twenty-four. An eighth with a sixth, a third or two-thirds.

67. Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to seven, eight, nine, or ten. Of the increase of six.

Of twelve.

68. Where twelve is the number, and it does not suit, it may be increased to thirteen, fifteen, or seventeen.

Of twenty-four.

69. Where twenty-four is the number, and it does not suit, it may be increased to twenty-seven.

SECTION V.

Rules of distribution among numerous claimants.

Equal numbers.

70. Numbers are said to be *mootumasil*, or equal, where they exactly agree.

Concordant.

71. They are said to be *mootudakhil*, or concordant, where the one number being multiplied, exactly measures the other.

Composit.

72. They are said to be *mootuwafiq*, or composit, where a third number measures them both.

Prime.

73. They are said to be *mootubayun*, or prime, where no third number measures them both.

Principles of distribution.

74. There are seven rules of distribution, the first three of which depend upon a comparison between the number of the heirs and the number of the shares; and the four remaining ones upon a comparison of the numbers of the different sets of heirs, after a comparison of the number of each set of heirs with their respective shares.

First principle.

75. The first is when, on a comparison of the number of the heirs and the number of shares, it appears that they exactly agree, there is no occasion for any arithmetical process. Thus, where the heirs are a father, a mother, and two daughters, the share of the parents is one-sixth each, and that of the daughters two-thirds. Here, according to principle 61, the division must be by six; of which each parent

takes one, and the remaining four go to the two daughters.

76. The second is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that some third number measures them both, when they are termed *mootuwafiq*, or composit; as in the case of a father, a mother, and ten daughters. Here according to principle 61, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the ten daughters, which cannot be done without a fraction; and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be composit, or agree in two. In this case the rule is, that half the number of such heirs, which is 5, must be multiplied into the number of the original division 6: thus 5 × 6=30; of which the parents take ten or five each, and the daughters twenty or two each. Second principle.

77. The third is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that there is one over and above between the number of such heirs, and the number of shares remaining for them. This is termed *mootubayun*, or prime, as in the case of a father, a mother, and five daughters. Here also according to principle 61 above quoted, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the five daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be Third principle.

mootubayun, or prime. In this case the rule is, that the whole number of such heirs, which is five, must be multiplied into the number of the original division. Thus 5 × 6=30; of which the parents take ten or five each, and the daughters twenty or four each.

Fourth principle.

78. The fourth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that all the sets are *mootumasil*, or equal, as in the case of six daughters, three grandmothers, and three paternal uncles; in which case according to principle 61, the division must be by six. Here in the first instance, a comparison must be made between the several sets and their respective shares. The share of the daughters is two-thirds, but two-thirds of six is 4, and 4 compared with the number of daughters 6, is *mootuwafiq*, or composit, agreeing in two. The share of the three grandmothers is one sixth, but one-sixth of six is 1, and 1 compared with the number of grandmothers is *mootubayun*, or prime. The remaining share which is one, will devolve on the three paternal uncles; but one compared with three is also *mootubayun*, or prime.

Then the rule is, that the sets of heirs themselves must be compared with each other, by the whole where it appears that they were *mootudakhil*, or concordant; or *mootubayun*, or prime; and by the measure where it appears that they were *mootuwafiq*, or composit, and if agreeing in two by half. In the instance of the daughters, the result of the former comparison was, that they agreed in two; consequently the half of their number must be compared with the whole number of the grandmothers and of the uncles, in whose cases the comparison showed a prime result. Thus 3=3 and 3=3, which being *mootumasil*, or equal, the rule is, that one of the numbers be multiplied into the number of the original

division. Thus $3 \times 6 = 18$, of which the daughters will take (two-thirds) twelve, or two each; the grandmothers will take (a sixth) three, or one each, and the paternal uncles will take the remaining three or one each.

79. The fifth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that the sets are *mootudakhil*, or concordant; as in the case of four wives, 3 grandmothers, and 12 paternal uncles. In this case, according to principle 65, the division must be by twelve. Fifth principle.

Here in the first instance, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is one-fourth; but the fourth of twelve is 3, and 3 compared with the number of wives is *mootubayun*, or prime. The share of the three grandmothers is one-sixth; but the sixth of twelve is 2, and 2 compared with the number of grandmothers is also prime. The remaining shares, which are seven, will devolve on the twelve paternal uncles; but 7 compared with 12 is also prime.

Then the rule is, that the sets of heirs themselves must be compared, the whole of each with the whole of each, as the preceding results show that they are prime, on a comparison of the several heirs with their respective shares. Thus $4 \times 3 = 12$, and $3 \times 4 = 12$, which being concordant, the one number measuring the other exactly, the rule is, that the greater number must be multiplied in to the number of the original division. Thus $12 \times 12 = 144$; of which the wives will get (one-fourth) thirty-six, or nine each, the grandmothers (a sixth) twenty-four, or eight each, and the paternal uncles the remaining eighty-four, or seven each.

80. The sixth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get Sixth principle.

their portions without a fraction, and that some of the sets are *mootuwafiq*, or composit, with each other ; as in the case of four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles ; in which case, according to principle 66, the original division must be by 24. Here in the first place, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is an eighth ; but an eighth of 24 is 3, and three compared with the number of wives is *mootubayun*, or prime. The share of the eighteen daughters is two-thirds ; but two-thirds of 24 is 16, and 16 compared with the number of daughters 18, is composit, and they agree in 2. The share of the fifteen female ancestors is one-sixth ; but a sixth of 24 is 4, and 4 compared with the number of female ancestors 15, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries ; but one and six are prime.

Then the rule is, that the sets of heirs themselves must be compared ; by the whole where the preceding result shows that they were prime, and by their measure, where it shows that they were composit. Thus $4\times2=9-1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set ; because the preceding result shows that set to have been prime. Thus $15\times2=36-6$ and $6=15-9$ and $6=9-3$, which agreeing in 3, the third of one number, must be multiplied into the whole of the other. This result must also be compared with the whole of the fourth set ; because the preceding result shows that set to have been prime. Thus $6\times30=180$, which being concordant, or agreeing in six, the sixth of one number must be multiplied into the whole of the other, but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this result must be multiplied into

the number of the original division. Thus $180 \times 24 = 4320$, of which the four wives will get an eighth, five hundred and forty, or one hundred and thirty-five each; the eighteen daughters two-thirds, two thousand eight hundred and eighty, or one hundred and sixty each; the female ancestors one-sixth, seven hundred and twenty, or forty-eight each; and the paternal uncles the remaining one hundred and eighty, or thirty each.

81. The seventh and last is when, on a comparison of the different sets of heirs, it appears that all the sets are *mootubayun*, or prime, and no one of them agrees with the other; as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. Here according to principle 66, the original division must be by 24. Seventh principle.

In the first instance, a comparison must be made between the several sets of heirs and their respective shares. Thus the share of the two wives is one-eighth; but the eighth of 24 is 3, and 3 compared with the number of wives is prime. The share of the six female ancestors is one-sixth; but the sixth of 24 is 4, and 4 compared with the number of female ancestors, is composit, or agrees in two. The share of the ten daughters is two-thirds; and two-thirds of 24 is 16, and 16 compared with the number of daughters is also composit, or agrees in two. The remaining share, which is one, will devolve on the seven paternal uncles; but 1 and 7 are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by the half or other measure, where it shows that they were composit. Agreeably to this rule the whole of the first set of heirs must be compared with half of the second: thus $2 = 3 - 1$, which numbers being prime must be multiplied into each other. Then the result must

be compared with the half of the next set, the former result here also having agreed in 2. Thus 5=6—1, which being prime, must be multiplied into each other. Then the result must be compared with the whole of the next set, the former result here having been prime. Thus 7×4=30—2×3=7—1,* which being also prime, must be multiplied into each other. Thus 30×7=210, in which case the rule is, that this last product must be multiplied into the number of the original division. Thus 210×24=5040, of which the wives will take an eighth, six hundred and thirty, or three hundred and fifteen each; the female ancestors a sixth, eight hundred and forty, or one hundred and forty each; the daughters two-thirds, three thousand three hundred and sixty, or three hundred and thirty-six each; and the paternal uncles the remaining two hundred and ten, or thirty each.

Rule for ascertaining the shares of different sets of heirs.

82. When the whole number of shares, into which an estate should be made, has been found, the mode of ascertaining the number of portions to which each set of heirs is entitled, is to multiply the portions originally assigned them, by the same number by which the aggregate of the original portions was multiplied; as an easy example of which rule the following case may be mentioned. There are a widow, eight daughters, and four paternal uncles; the shares of the two first sets being one-eighth and two-thirds; the estate, according to principle 66, must be made originally into 24 parts, of which the widow is entitled to 3, the daughters to 16, and there remain 5 to be divided among the four paternal uncles, but which cannot be done without a fraction. Here the proportion between the shares and the heirs who cannot get their portions without a fraction, must be ascertained, and 4=5—1, being prime, the rule is, (see No. 77,) to multiply the number of the original division by the whole

* Note.—There is apparently an error, or omission of the figure 2 here, in the original text.—Ed.

number of the heirs so situated. Thus $24\times4=96$. Here to find the shares of each set multiply what each was originally declared entitled to, by the number by which the aggregate of all the original portions was multiplied. Thus $3\times4=12$, the share of the widow; $16\times4=64$, the share of the daughters; and $5\times4=20$, the share of the paternal uncles.

83. To find the portion of each individual in the several sets of heirs, ascertain how many times the number of persons in each set may be multiplied into the number of shares ultimately assigned to each set. Thus $8\times8=64$, and $5\times4=20$. Here eight will be the share of each daughter, and four the share of each paternal uncle, which, with the twelve which formed the share of the widow, will make up the required number ninety-six. Rule for ascertaining the shares of each individual of the different sets of heirs.

SECTION VI.

Of exclusion from and partial surrender of Inheritance.

84. Exclusion is either entire or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant, a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion is brought about by some of the personal disqualifications enumerated in principle (6), or by the intervention of an heir, in default of whom a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance. Two descriptions of exclusion. Explanation of

85. Those who are entirely excluded by reason of personal disqualification, do not exclude other heirs, either entirely or partially; but those who are excluded by reason of some intervening heir, do in some instances partially exclude others. In what case an entirely excluded heir partially excludes others.

Example. 86. For instance, a man dies, leaving a father, a mother, and two sisters, who are infidels. Here the mother will get her third, notwithstanding the existence of the two infidel sisters, who are excluded by reason of their personal disqualification; but had they not been infidels, she would only have been entitled to a sixth, although the sisters, who partially exclude her, are themselves entirely excluded by reason of the intervention of the father.

Rules where one of the heirs makes a partial surrender of his right. 87. If one of the heirs choose to surrender his portion of the inheritance for a consideration, still he must be included in the division. Thus in the case of there being a husband, a mother, and a paternal uncle, the shares are one-half and one-third. Here according to principle 64, the property must be made into six shares; of which the husband was entitled to three, the mother to two, and the paternal uncle, as a residuary, to the remaining one. Now supposing the estate left to amount to six lacs of Rupees, and the husband to content himself with two, still as far as affects the mother, the division must be made as if he had been a party and of the remaining four lacs the mother must get two; otherwise, were he not made a party, the mother would get only one-third of four, instead of one-third of six lacs as her legal share, and the remainder would go to the uncle as residuary.

SECTION VII.

Of the increase.

Definition of the increase. 88. The increase is where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found, on a distribution of the shares into which it is necessary to make the estate, that there is not a sufficient number to satisfy the just demands of all the claimants.

89. It takes effect in three cases; either when the estate should be made into six shares, or when it should be made into twelve, or when it should be made into twenty-four. See principles (67, 68, 69). One example will suffice: Cases in which it takes effect.

90. A woman leaves a husband, a daughter, and both parents. Here the property should be made into twelve parts, of which, after the husband has taken his fourth or three, and the parents have taken their two-sixths or four, there remain only five shares for the daughter, instead of six, or the moiety to which by Law she is entitled. In this case the number twelve, into which it was necessary to make the estate, must be increased to thirteen, with a view of enabling the daughter to realize six shares of the property. Example of.

SECTION VIII.

Of the Return.

91. The return is where there being no residuaries, the surplus, after the distribution of the shares, returns to the sharers, and the doctrine of it is as follows: Definition of the return.

92. It takes effect in four cases; first, where there is only one class of sharers, unassociated with those not entitled to claim the return, as in the instance of two daughters, or two sisters; in which case the surplus must be made into as many shares as there are sharers, and distributed among them equally. Circumstances under which it takes effect. First case example of.

93. Secondly, where there are two or more classes of sharers, unassociated with those not entitled to claim the return, as in the instance of a mother and two daughters; in which case the surplus must be made into as many shares as may correspond with the shares of inheritance to which the parties are entitled, and distributed accordingly. Thus the Second case example of.

mother's share being one-sixth, and the two daughter's share two-thirds, the surplus must be made into six, of which the mother will take two and the daughters four.

Third case example of.

94. Thirdly, when there is only one class of sharers, associated with those not entitled to claim the return, as in the instance of three daughters and a husband; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently, with giving the person excluded from the return his share of the inheritance, (which is in this case four), and the husband will take one as his legal share or a fourth, the remaining three going to the daughters as their legal shares and as the return; but if it cannot be so distributed without a fraction, as in the case of a husband and six daughters, (three not being capable of division among six), the proportion must be ascertained between the shares and sharers. Thus $3 \times 2 = 6$, which agreeing in three, the rule is, that the number 4, into which the estate was intended to be distributed, must be multiplied by 2, that is, the measure or a third of the number of those entitled to the return. Thus $4 \times 2 = 8$, of which the husband will take two, and the daughters six or one each; and if on a comparison as above, the result should be prime, as in the case of a husband and five daughters, the number 4, into which it was intended to distribute the estate, must be multiplied by 5, or the whole of the number of those entitled to a return. Thus $4 \times 5 = 20$, of which the husband will take five, and the daughters fifteen or three each.

Fourth case example of.

95. Fourthly, where there are two or more classes of sharers, associated with those not entitled to claim the return, as in the instance of a widow, four paternal

grandmothers, and six sisters by the same mother only; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return her share of the inheritance, (which is in this case four). Then, after the widow has taken her share, there remain three to be divided among the grandmothers and half sisters; but the share of the grandmothers is one-sixth, and of the half sisters one-third, and here, to give them their portions, the remainder should be made into six: but a third and a sixth of this number, amount to three, which agrees with the number to be divided among them; of which the half sisters will take two, and the grandmothers one. Had there been only one grandmother, and only two half sisters, there would have been no necessity for any further process, as the grandmother would have taken one-third, and the two half sisters the other two-thirds. But it is obvious, that two shares cannot be distributed among the six half sisters nor one among the four paternal grandmothers without a fraction. To find the number into which the remainder should be made, recourse must be had to the seventh principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $2 \times 3 = 6$, which being composit or agreeing in two, and $1 \times 3 = 4 - 1$, which being prime, the whole of one set of sharers must be compared with the half of the other. Thus $3 = 4 - 1$, which also being prime, one of the numbers must be multiplied by the other. Thus $3 \times 4 = 12$; and having found this number it must be multiplied into that of the original division. Thus $4 \times 12 = 48$, of which the grandmothers will get 12 or three each, 12 being to 48 as 1 to 4, and the half sisters 24 or 4 each, 24 being to 48 as 2 to 4, and the widow will take the remaining twelve. It is different if the shares of the persons entitled to a return, do not agree with the

number left for them, after deducting the share of the person not entitled to a return, as in the case of a widow, nine daughters, and six paternal grandmothers. Here the property must in the first instance be made into eight shares, being the smallest number of which it is susceptible, consistently with giving the widow her share. Then, after the widow has taken her share, there remain seven to be divided among the daughters and the grandmothers; but the share of the grandmothers is one-sixth, and of the daughters two-thirds; and here to give them their portions the property divisible among them should be made into six parts; but a sixth and two-thirds of this number amount to 5, which disagrees with the number to be divided among them; in which case the rule is, that the number of shares of those entitled to a return, must be multiplied by the number into which it was necessary to make the property originally. Thus $8 \times 5 = 40$, of which the widow will take 5, the daughters will take 28, and the grandmothers 7. But it is obvious, that 28 cannot be distributed among the nine daughters, nor 7 among the six paternal grandmothers, without a fraction. To find the number into which the remainder should be distributed, recourse should be had to the sixth principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $9 \times 3 = 28 - 1$, and $6 = 7 - 1$, both of which being prime, the whole of one set of sharers must be compared with the whole of the other set. Thus $6 = 9 - 3$, which being concordant or agreeing in 3, the rule is, that the third of one of the numbers must be multiplied into the whole of the other. Thus $3 \times 6 = 18$; and having found this number, it must be multiplied into that of the preceding result. Thus $40 \times 18 = 720$, of which the daughters will get 504 or 56 each, 504 being to 720 as 28 to 40; the grandmothers will get 126 or 21 each, 126 being to 720 as 7 to 40; and the widow will get the remaining ninety.

SECTION IX.

Of vested inheritances.

96. Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death, and it must be supposed that they received their respective shares accordingly. Definition of vested inheritances. Rules in case of.

97. The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs. Ditto.

98. If the proportion should appear to be prime, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the whole number of the shares into which it is necessary to make the estate, at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the number of shares to which the deceased was entitled at the preceding one. Ditto.

99. If the proportion should be concordant, or composit, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the measure of the number of shares into which it is necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the Ditto.

measure of the number of shares to which the deceased was entitled at the preceding distribution.

Example of. 100. For instance, a man dies leaving A, his wife, B and C, his two sons, and D and E, his two daughters; of whom A and D died before the distribution, the former leaving a mother, and the latter a husband.

At the first distribution the estate should be made into forty-eight shares, of which the widow will get six, the sons fourteen each, and the daughters seven each. On the death of the widow, leaving a mother and the above four children, her estate should, in the first instance, be made into thirty-six parts, of which the mother is entitled to six, the sons to ten each, and the daughters to five each; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make the estate. Thus 6×6=36, which proving concordant, or agreeing in six, the rule is, that the aggregate and individual shares of the preceding distribution be multiplied by six, or the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus 48×6=288, and 14×6=84, and 7×6=42; but the measure of the number to which the deceased was entitled at the preceding distribution being only one, it is needless to multiply by it the shares at the second distribution. On the death of one of the daughters, leaving her two brothers, her sister, and a husband, her estate should, in the first instance, be made into ten parts, of which her husband is entitled to five, her brothers to two each, and her sister to one; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to

which she was entitled at the preceding distribution, and the number into which it is necessary to make her estate. But she derived forty-seven shares from the preceding distributions, (five at the second and forty-two at the first). Thus $10 \times 4 = 47 - 7$, and $7 = 10 - 3$, and $3 = 7 - 4$, and $3 = 4 - 1$, which proving prime or agreeing in a unit only, the rule is, that the aggregate and individual shares of the preceding distributions be multiplied by ten, or the whole number of shares into which it is necessary to make the estate at the third distribution. Thus $288 \times 10 = 2880$, and $84 \times 10 = 840$, and $42 \times 10 = 420$, and $6 \times 10 = 60$, and $10 \times 10 = 100$, and $5 \times 10 = 50$. Then the shares at the third distribution should be multiplied by the number of shares to which the deceased sister was entitled at the preceding distributions. Thus $5 \times 47 = 235$, and $2 \times 47 = 94$, and $1 \times 47 = 47$. Therefore of the 2880 shares, the son B will get $840 + 100 + 94 = 1034$; the son C $840 + 100 + 94 = 1034$; the daughter E $420 + 50 + 47 = 517$; the mother of A 60, and the husband of D 235.

SECTION X.

Of missing persons and posthumous children.

101. The property of a missing person is kept in abeyance for ninety years. His estate in this interval cannot derive any accession from the intermediate death of others, nor can any person who dies during this interval inherit from him. **Of missing persons.**

102. If a missing person be a coheir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case the daughters **Of a missing person being a coheir with others.**

will take half the estate immediately, as that must be their share at all events; but the grand children will not take any thing, as they are precluded on the supposition of their father's being alive.

Of a child in the womb, there being sons.

103. Where a person dies leaving his wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born.

Of a child in the womb, there being heirs who would succeed only on its default.

104. Where a person dies leaving his wife pregnant, and he has no sons, but there are other relatives who would succeed in the event only of his having no child, (as would be the case, for instance, with a brother or sister), no immediate distribution of the property takes place.

Of the same there being heirs who would take at all events.

105. But if those other relatives would succeed at all events to some portion, (larger without than with a child, as would be the case, for instance, with a mother) the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be not born alive, her portion will be augmented to one-third.

SECTION XI.

De Commorientibus.

Rule of succession where two or more individuals meet with a sudden death at the same time.

106. Where two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed according to one opinion, that the youngest survived longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the

intermediate heirs who died at the same time with the original proprietor had never existed.*

SECTION XII.

Of the distribution of assets.

107. What has preceded relates to the ascertainment of the shares to which the several heirs are *entitled;* but when the proper number of shares into which an estate should be made, may have been ascertained, it seldom happens that the assets of the estate exactly tally with such number; in other words, if it be found that the estate should be made into ten, or into fifty shares, it would seldom happen that the assets exactly amount in value to ten or fifty gold mohurs or rupees. To ascertain the proper shares of the different sets of heirs and creditors in such cases, the following rules are laid down: Of claims and assets.

108. When the number of shares has been found into which the estate should be divided, and the number of shares to which each set of heirs is entitled, the former number must be compared with the number of the assets. If these numbers appear to be prime to each other, the rule is, that the share of each set of heirs must be multiplied into the number Rules for apportioning them.

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* The following case may be cited as an example of this rule. A, B and C are grandfather, father and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law recognizes no right by representation, and sons excludes grandsons. Mr. Christian in a note to Blackstone's Commentaries (vol. 2. page 516) notices a curious question that was agitated some time ago, where it was contended that when a parent and child perish together and the priority of their deaths is unknown, it was a rule of the civil law to presume that the child survives the parent. He proceeds however to say " But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. Some curious cases *de commorientibus* may be seen in *causes celebres* 3 *tom* 412 et seq. in one of which where a father and son were slain together in battle and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father."

Where the numbers are prime. of the assets, and the result divided by the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving a widow, two daughters, and a paternal uncle, and property to the amount of 25 Rupees. In this case, the estate should be originally divided into 24, of which the widow is entitled to 3, the daughters to 16, and the uncle to 5. Now to ascertain what shares of the estate left, these heirs are entitled to, the above rule must be observed. Thus $3 \times 25=75$, and $16 \times 25=400$, and $5 \times 25=125$; but $75 \div 24=3\frac{3}{24}$, and $400 \div 24=16\frac{16}{24}$, and $125 \div 24=5\frac{5}{24}$.

Ditto where they are composit. 109. If the numbers are composit, the rule is that the share of each set of heirs must be multiplied into the measure of the number of the assets and the result divided by the measure of the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving the same number of heirs as above and property to the amount of 50 rupees. Now as 24 and 50 agree in 2 the measure of both numbers is half. Thus $3 \times 25=75$, and $16 \times 25=400$, and $5 \times 25=125$, but $75 \div 12=6\frac{3}{12}$, and $400 \div 12=33\frac{4}{12}$, and $125 \div 12=10\frac{5}{12}$.

And of individual heirs. 110. If it be desired to ascertain the number of shares of the assets to which each individual heir is entitled, the same process must be resorted to, with this difference, that the number of the assets must be compared with the share originally allotted to each individual heir, and the multiplication and division proceeded on as above. For instance, in the above case the original share of each daughter was 8, and $8 \times 25=200$, and $200 \div 12=16\frac{8}{12}$.

And of creditors. 111. In a distribution of assets among creditors the rule is, that the aggregate sum of their debts must be the number

the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of one creditor to amount to 16 rupees, of another to 5, and of another to 3, and the debtor to have left property to the amount of 21 rupees. By observing the same process as that laid down in principle (109), it will be found that the creditor to whom the debt of 16 rupees was due, is entitled to 14 rupees; the creditor of 5 rupees to 4 rupees 6 annas, and the creditor of 3 rupees to 2 rupees 10 annas.

SECTION XII.

Of Partition.

112. Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted; and so also where one heir claims it, provided the property admit of separation without detriment to its utility. Property where conveniently partible should be distributed among the heirs at the desire of one or more.

113. But where the property cannot be separated without detriment to its several parts, the consent of all the coheirs is requisite; so also where the estate consists of articles of different species. In other cases the distribution should not take place without the consent of all.

114. On the occasion of a partition, the property (where it does not consist of money) should be distributed into several distinct shares, corresponding with the portions of the coheirs; each share should be appraised, and then recourse should be had to drawing of lots. Mode of distribution.

115. Another common method of partition is by usufruct, where each heir enjoys the use or the profits of the property by rotation; but this method is subordinate to actual partition and where one coheir demands separation, and the other a division of the usufruct only, the former claim is entitled to preference in all practicable cases. Of partition by usufruct.

CHAPTER II.

OF INHERITANCE ACCORDING TO THE IMAMEEYA, OR SCHIA DOCTRINE.

Three sources of the right of Inheritance.

1. According to the tenets of this Sect, the right of inheritance proceeds from three different sources.

Enumeration of them.

2. First, it accrues by virtue of consanguinity. Secondly, by virtue of marriage. Thirdly, by virtue of Willa.*

Heirs by consanguinity consist of three degrees.

3. There are three degrees of heirs who succeed by virtue of consanguinity; and so long as there is any one of the first degree, even though a female, none of the second degree, can inherit; and so long as there is any one of the second degree, none of the third can inherit.

Enumeration of heirs of the first degree.

Their relative rights.

4. The first degree comprises the parents, and the children, and grand children, how low in descent soever, the nearer of whom exclude the more distant. Both parents, or one of them inherit together with a child, a grand child, or a great grand child; but a grand child does not inherit together with a child, nor a great grand child together with a grand child.

Subdivision of.

5. This degree is divided into two classes; the roots which are limited, and the branches which are unlimited. The former are the parents who are not represented by their parents; the latter are the children who are repre-

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* In a note to his translation of the Hedaya, Mr. Hamilton observes, that "there is no single word in our language, fully expressive of this term. The shortest definition of it is, "the relation between the master (or patron) and his Freedman," but even this does not express the whole meaning. Had he proceeded to state "and the relation between two persons who had made a reciprocal testamentary contract," the definition might have been more complete.

sented by their children. An individual of one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other in proportion to their proximity.

6. No claimant has a title to inherit with children, but the parents, or the husband and wife. Of coheirs with children.

7. The children of sons take the portions of sons, and the children of daughters take the portions of daughters, however low in descent. Of the sons' and daughters' offspring.

8. The second degree comprises the grandfather, and grandmother, and other ancestors, and brothers, and sisters, and their descendants, however low in descent, the nearer of whom exclude the more distant. The great grandfather cannot inherit together with a grandfather or a grandmother; and the son of a brother cannot inherit with a brother or a sister; and the grandson of a brother cannot inherit with the son of a brother, or with the son of a sister. Of the second degree. Their relative rights.

9. This degree again is divided into two classes; the grand parents and other ancestors, and the brethren and their descendants. Both these classes are unlimited, and their representatives in the ascending and descending line, may be extended *ad infinitum*. An individual of the one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other, in proportion to their proximity. Subdivision of.

10. The third degree comprises the paternal and maternal uncles and aunts and their descendants, the nearer of whom exclude the more distant. The son of a paternal Of the third degree.

Their relative rights. uncle cannot inherit with a paternal uncle, or a paternal aunt, nor the son of maternal uncle with a maternal uncle, or a maternal aunt.

Additional rules. 11. This degree is unlimited in the ascending and descending line, and their representatives may be extended *ad infinitum*; but so long as there is a single aunt or uncle of the whole blood, the descendants of such persons cannot inherit. Uncles and aunts all share together; except some be of the half and others of the whole blood. A paternal uncle by the same father only, is excluded by a paternal uncle by the same father and mother; and the son of a paternal uncle by the whole blood excludes a paternal uncle of the half blood.

Enumeration of other heirs, of the third degree. 12. In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed; and in their default their descendants, to the remotest generation, according to their degree of proximity to the deceased. In default of all those heirs, the paternal and maternal uncles and aunts of the grand parents and great grand parents inherit, according to their degree of proximity to the deceased.*

General rule relative to the half and whole blood. 13. It is a general rule that the individuals of the whole blood exclude those of the half blood, who are of the same rank; but this rule does not apply to individuals

Exception. of different ranks. For instance, a brother or sister of the whole blood excludes a brother or sister of the half

* There seems to be some similarity between the order of succession here laid down, and that prescribed in the English Law for taking out Letters of administration: "In the first place the children, or on failure of the children, the parents of the deceased, are entitled to the administration; both which indeed are in the first degree; but with us the children are allowed the preference. Then follow brothers, grandfathers, uncles or nephews, (and the females of each class respectively), and lastly, cousins. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the Intestate." *Blackstone's Commentaries*, vol. 2, Page 504.

blood, a son of the brother of the whole blood, however, does not exclude a brother of the half blood, because they belong to different ranks; but he would exclude the son of a half brother who is of the same rank; so also an uncle of the whole blood does not exclude a brother of the half blood, though he does an uncle of the half blood. Example.

14. The principle of the whole blood excluding the half blood, is confined also to the same rank, among collaterals; for instance, generally a nephew or niece whose father was of the whole blood, does not exclude his or her uncle or aunt of the half blood; except in the case of there being a son of a paternal uncle of the whole blood, and a paternal uncle of the half blood by the same father only, the latter of whom is excluded by the former. Additional rules. Exception.

15. This principle of exclusion does not extend to uncles and aunts being of different sides of relation to the deceased; for instance, a paternal uncle or aunt of the whole blood, does not exclude a maternal uncle or aunt of the half blood; but a paternal uncle or aunt of the whole blood, excludes a paternal uncle or aunt of the half blood, and so likewise a maternal uncle or aunt of the whole blood, excludes a maternal uncle or aunt of the half blood. Additional rule where the sides of relation differ. And where they are the same.

16. If a man leave a paternal uncle of the half blood, and a maternal aunt of the whole blood, the former will take two-thirds, in virtue of his claiming through the father, and the latter one-third, in virtue of her claiming through the mother; as the property would have been divided between the parents in that proportion, had they been the claimants instead of the uncle and aunt. Additional rule where the sides differ.

Further exception relative to the exclusion of the half blood.

17. The general rule, that those related by the same father and mother, exclude those who are related by the same mother only does not operate in the case of individuals to whom a legal share has been assigned.

Of uterine and half sisters.

18. If a man leave a whole sister, and a sister by the same mother only, the former will take half the estate and the latter one-sixth, the remainder reverting to the whole sister; and if there be more than one sister by the same mother only, they will take one-third, and the remaining two-thirds will go to the whole sister.

Rule in case of a double relation.

19. Where there are two heirs, one of whom stands in a double relation: for instance, if a man die leaving a maternal uncle, and a paternal uncle who is also his maternal uncle* the former will take one-third, and the latter two-thirds, and he will be further entitled to take one-half of the third which devolved on the maternal uncle; and thus he will succeed altogether to five-sixths, leaving the other but one-sixth.

Of claimants by marriage.

20. Secondly, those who succeed in virtue of marriage are the husband and wife, who can never be excluded in any possible case; and their shares are half for the husband, and a fourth for the wife, where there are no children, and a fourth for the husband, and an eighth for the wife, where there are children.

Of the succession of husband and wife.

21. Where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband

* The relation of paternal and maternal uncle may exist in the same person in the following manner: A having a son C by another wife, marries B having a son D by another husband. Then C and D intermarry and have issue, a son E, and A and B have a son F. Thus F is both the paternal and maternal uncle of E. So likewise if a person have a half brother by the same father, and a half sister by the same mother, who intermarry, he will necessarily be the paternal and maternal uncle of their issue.

dies, leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the remaining three-fourths will escheat to the public treasury.

22. If a sick man marry and die of that sickness, without having consummated the marriage, his wife shall not inherit his estate; nor shall he inherit if his wife die before him, under such circumstances. But if a sick woman marry, and her husband die before her, she shall inherit of him, though the marriage was never consummated, and though she never recovered from that sickness. Rule in case of marriage not consummated.

23. If a man on his deathbed divorce his wife, she shall inherit, provided he died of that sickness within one year from the period of divorce; but not if he lived for upwards of a year. Rule in case of divorce on deathbead.

24. In case of a reversible divorce, if the husband die within the period of the wife's probation, or if she die within that period, they have a mutual right to inherit each other's property. And of reversible divorce.

25. The wife by an usufructuary, or temporary marriage, has no title to inherit.* And of irregular marriage.

26. Thirdly, those who succeed in virtue of *Willa*; but they never can inherit so long as there is any claimant by consanguinity or marriage. Of claimants by *willa*.

27. *Willa* is of two descriptions; that which is derived from manumission, where the emancipator by such act derives a right of inheritance; and that which depends on Two descriptions of.

* This species of contracts is reprobated by the orthodox sect, and they are both considered wholly illegal. See Hamilton's Hedaya, vol. 1, pages 71 and 72.

mutual compact, where two persons reciprocally engage, each to be heir of the other.

The first preferred.

28. Claimants under the latter title are excluded by claimants under the former.

General rules of exclusion.

29. The general rules of exclusion, according to this sect, are similar to those contained in the orthodox doctrine; except that they make no distinction between male and female relations. Thus a daughter excludes a son's son, and a maternal uncle excludes a paternal granduncle; whereas, according to the orthodox doctrine in such cases, the daughter would only get half, and the maternal uncle would be wholly excluded by the paternal uncle of the father.

Difference of allegiance does not exclude, nor homicide, unless wilful.

30. Difference of allegiance is no bar to inheritance, and homicide, whether justifiable or accidental, does not operate to exclude from the inheritance. The homicide, to disqualify, must have been of *malice prepense*.

The doctrine of the increase not admitted.

31. The legal number of shares into which it is necessary to make the property, cannot be increased if found insufficient to satisfy all the heirs without a fraction. In such case, a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. For instance, in the case of a husband, a daughter and parents. Here the property must be divided into twelve, of which the husband is entitled to three or a fourth; the parents to two-sixths or four, and the daughter to half; but there only remain five shares for her instead of six, or the moiety to which she is entitled. In this case, according to the orthodox doctrine, the property would have been made into thirteen parts to give the daughter

Example.

her six shares; but according to the *Imameeya* tenets, the daughter must be content with the five shares that remain, because in certain cases her right as a legal sharer, is liable to extinction; for instance, had there been a son, the daughter would not have been entitled to any specific share, and she would become a residuary; whereas the husband or parents can never be deprived of a legal share, under any circumstances.

32. Where the assets exceed the number of heirs the surplus reverts to the heirs. The husband is entitled to share in the return; but not the wife. The mother also is not entitled to share in the return, if there are brethren; and where there is any individual possessing a double relation, the surplus reverts exclusively to such individual. Of the return.

33. On a distribution of the estate, the elder son if he be worthy, is entitled to his father's sword, his Koran, his wearing apparel and his ring.* Privilege of primogeniture.

* In the foregoing summary I am not aware that I have omitted any point of material importance. The legal shares allotted to the several heirs are of course the same as those prescribed in the Soonee Code, both having the precepts of the Koran as their guide. The rules of distribution and of ascertaining the relative shares of the different claimants are also (*mutatis mutandis*) the same. It is not worth while to notice in this compilation the doctrines of the *Imameeya* sect on the law of contracts or their tenets in miscellaneous matters. A Digest of their laws, relative to those subjects, was some time ago prepared and a considerable part of it translated by an eminent Orientalist (Colonel John Baillie) by whom however it was left unfinished; probably from an opinion that the utility of the undertaking might not be commensurate to the time and labour employed upon it.

CHAPTER III.

OF SALE.

Definition of sale.

1. Sale is defined to be a mutual and voluntary exchange of property for property.*

How effected.

2. A contract of sale may be effected by the express agreement of the parties, or by reciprocal delivery.

Four kinds of.

3. Sale is of four kinds; consisting of commutation of goods for goods: of money for money: of money for goods: and of goods for money; which last is the most ordinary species of this kind of contract.

Four denominations of.

4. Sales are either absolute, or conditional, or imperfect, or void.

Of an absolute sale.

5. An absolute sale is that which takes effect immediately; there being no legal impediment.

Of a conditional sale.

6. A conditional sale is that which is suspended on the consent of the proprietor, or (where he is a minor) on the consent of his guardian, in which there is no legal impediment, and no condition requisite to its completion but such consent.

Of an imperfect sale.

7. An imperfect sale is that which takes effect on seizin; the legal defect being cured by such seizin.†

Of a void sale.

8. A void sale is that which can never take effect; in which the articles opposed to each other, or one of them, not bearing any legal value the contract is nude.

Of the consideration.

9. The consideration may consist of whatever articles, bearing a legal value, the seller and purchaser may agree upon; and property may be sold for prime cost, or for more, or for less than prime cost.

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* Note.—Sale as the term is used in Mahomedan law, includes barter, and also loan, when the articles lent are intended to be consumed, and replaced to the lender by a similar quantity of the same kind. Baillie's Mahomedan Law of Sale, Intro. p. xli.—Ed.

† Vide App. Tit. Gift, note to Case 40. Baillie's Sale, p. 6, note.

10. It is requisite that there should be two parties to every contract of sale, except where the seller and purchaser employ the same agent, or where a father or a guardian makes a sale on behalf of a minor, or where a slave purchases his own freedom by permission of his master. Of the parties.

11. It is sufficient that the parties have a sense of the obligation they contract, and a minor, with the consent of his guardian, or a lunatic in his lucid intervals, may be contracting parties. Who may contract.

12. In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery; but in a commutation of money for goods or of goods for money, such stipulation is authorized. Postponing payment illegal. Exception.

13. It is essential to the validity of every contract of sale, that the subject of it on the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties. Certainty requisite.

14. It is also essential that the subject of the contract should be in actual existence at the period of making the contract, or that it should be susceptible of delivery, either immediately or at some future definite period. Other requisite conditions.

15. In a commutation of money for money, or of goods for goods, if the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition. Equality when requisite.

16. It is unlawful to stipulate for any extraneous condition, involving an advantage to either party, or any uncertainty which might lead to future litigation; but if the Illegal conditions.

Exception. extraneous condition be actually performed, or the uncertainty removed, the contract will stand good.

Of option. 17. It is lawful to stipulate for an option of dissolving the contract; but the term stipulated should not exceed three days.

Payment how deferrible. 18. When payment is deferred to a future period, it must be determinate and cannot be suspended on an event, the time of the occurrence of which is uncertain, though its occurrence be inevitable. For instance, it is not lawful to suspend payment until the wind shall blow, or until it shall rain, nor is it lawful, even though the uncertainty be so inconsiderable as almost to amount to a fixed term; for instance, it is not lawful to suspend payment until the sowing or reaping time.*

Sale of a debt. 19. It is not lawful to sell property in exchange for a debt due from a third person, though it is for a debt due from the seller.

Resale of personal property. 20. A resale of personal property cannot be made by the purchaser until the property shall actually have come into his possession.

Warranty implied. 21. A warranty as to freedom from defect and blemish, is implied in every contract of sale.

Where the property differs from the description. 22. Where the property sold differs, either with respect to quantity or quality from what the seller had described it, the purchaser is at liberty to recede from the contract.

Sale of land. 23. By the sale of land nothing thereon, which is of a transitory nature, passes. Thus the fruit on a tree belongs to the seller, though the tree itself, being a fixture, appertains to the purchaser of the land.

* Note.—This last instance is a very common custom in parts of the Madras Presidency.—Ed.

24. Where an option of dissolving the contract has been stipulated by the purchaser, and the property sold is injured or destroyed in his possession, he is responsible for the *price* agreed upon; but where the stipulation was on the part of the seller, the purchaser is responsible for the *value* only of the property. Responsibility in case of option.

25. But the condition of option is annulled by the purchaser's, exercising any act of ownership, such as to take the property out of *statu quo*. Option how annulled.

26. Where the property has not been seen by the purchaser, nor a sample, (where a sample suffices), he is at liberty to recede from the contract, provided he may not have exercised any act of ownership; if upon seeing the property it does not suit his expectation, even though no option may have been stipulated. Option to purchasers of unseen property. Exception.

27. But though the property have not been seen by the seller, he is not at liberty to recede from the contract (except in a sale of goods for goods) where no option was stipulated. No option to sellers. Exception.

28. A purchaser, who may not have agreed to take the property with all its faults, is at liberty to return it to the seller on the discovery of a defect, of which he was not aware at the time of the purchase, unless while in the hands of the purchaser it received a further blemish; in which case he is *only* entitled to compensation. Option on discovering a defect. Exception.

29. But if the purchaser have sold such faulty article to a third person, he cannot exact compensation from the original seller; unless, by having made an addition to the article prior to the sale, he was precluded from returning it to the original seller. Rule in case of resale. Exception.

Cases in which restitution may be demanded.

30. In a case where articles are sold, and are found on examination to be faulty, complete restitution of the price may be demanded from the seller, even though they have been destroyed in the act of trial, if the purchaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportional compensation.

And compensation only.

The first purchaser is on a footing with the second.

31. If a person sell an article which he had purchased, and be compelled to receive back such article and to refund the purchase money, he is entitled to the same remedy against the original seller, if the defect be of an inherent nature.

Proviso.

Remedy against the seller how lost.

32. If a purchaser, after becoming aware of a defect in the article purchased, make use of the article or attempt to remove the defect, he shall have no remedy against the seller, (unless there may have been some special clause in the contract); such act on his part implying acquiescence.

General rules for the right of restitution.

33. It is a general rule, that if the articles sold are of such a nature as not easily to admit of separation or division without injury, and part of them, subsequently to the purchase, be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole, demanding compensation for the proportion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury.

And that of compensation.

Illegal practices.

34. The practices of forestalling, regrating, and engrossing, and of selling on Friday, after the hour of prayer, are all prohibited, though they are valid.

NOTE.—1. Informality does not vitiate a Deed of Sale, Case viii. Prece.

2. The right of pre-emption cannot be pleaded between the seller and the purchaser as a ground to invalidate a sale.—Ditto.

CHAPTER IV.

OF *SHOOFAA*, OR PRE-EMPTION.

1. *Shoofaa*, or the right of Pre-emption, is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser. **Definition of pre-emption.**

2. The right of pre-emption takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property the possession of which has been transferred by gift, or by will, or by inheritance; unless the gift was made for a consideration, and the consideration was expressly stipulated; but pre-emption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated. **With respect to what property it does and to what it does not take effect.**

3. The right of pre-emption takes effect with regard to property, whether divisible or indivisible; but it does not apply to moveable property, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned. **Additional rules.**

4. The right of pre-emption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion. **Not restricted to any particular class.**

5. All rights and privileges which belong to an ordinary purchaser, belong equally to a purchaser under the right of pre-emption. **Rights and privileges of.**

6. The following persons may claim the right of pre-emption in the order enumerated: A *partner in the **Who may claim pre-emption.**

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* Vide App. Tit. Pre. 1.

property sold, a participator in its appendages, and a neighbour.

Necessary forms to be observed.

7. It is necessary that the person claiming this right, should declare his intention of becoming the purchaser, immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation, by witness, of such his intention, either in the presence of the seller, or of the purchaser, or on the premises.

Claim when preferrible.

8. The above preliminary conditions being fulfilled, the claimant of pre-emption is at liberty at any subsequent period to prefer his claim to a Court of Justice.*

Rights of the first purchaser.

9. The first purchaser has a right to retain the property until he has received the purchase money from the claimant by pre-emption, and so also the seller in a case where delivery may not have been made.

Rules where the property has undergone alteration while in the possession of the first purchaser.

10. Where an intermediate purchaser has made any improvements to the property, the claimant by pre-emption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, he (the claimant) may insist on a proportional abatement of the price; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether.

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* Much difference of opinion prevails as to this point. It seems equitable that there should be some limitation of time to bar a claim of this nature; otherwise a purchaser may be kept in a continual state of suspense. Ziffer and Moohummud are of opinion, (and such also is the doctrine according to one tradition of Aboo Yoosuf), that if the claimant causelessly neglect to advance his claim for a period exceeding one month, such delay shall amount to a defeasance of his right; but according to Aboo Huneefa, and another tradition of Aboo Yoosuf, there is no limitation as to time. This doctrine is maintained in the Futawai Aulumgeeree, in the Moheetoo Surukhsee, and in the Hedaya; and it seems to be the most authentic, and generally prevalent opinion. But the compiler of the Futawai Aulumgeeree admits that decisions are given both ways.

11. But a claimant by pre-emption having obtained possession of, and made improvements to property, is not entitled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will, in this case, recover the price from the seller or from the intermediate purchaser, (if possession had been given), and he is at liberty to remove his improvements. Rules where the property has been improved by the claimant by pre-emption, and it appear to belong to a third person.

12. Where there is a dispute between the claimant by pre-emption and the purchaser, as to the price paid, and neither party have evidence, the assertion, on oath, of the purchaser must be credited; but where both parties have evidence, that of the claimant by pre-emption should be received in preference. Where there is a dispute as to the price paid.

13. There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim, he can sell all his property, with the exception of that part immediately bordering on his neighbour's, and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation. Legal devices by which a claim of pre-emption may be evaded.

CHAPTER V.

OF GIFTS.

Definition of gift.

1. A gift is defined to be the conferring of property without a consideration.

Essential conditions of.

2. Acceptance and seizin, on the part of the donee, are as necessary as relinquishment on the part of the donor.

Cannot be made to take effect *in futuro.*

3. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future definite period.

Delivery and seizin requisite.

4. It is requisite that a gift should be accompanied by delivery of possession, and that seizin should take effect immediately, or, if at a subsequent period, by desire of the donor.*

The thing given must be actually existing at the time.

5. A gift cannot be made of any thing to be produced *in futuro;* although the means of its production may be in the possession of the donee. The subject of the gift must be actually in existence at the time of the donation.

An undefined gift of divisible property not valid.

6. The gift of property which is undivided, and mixed with other property, admitting at the same time of division or separation, is null and void, unless it be defined previously to delivery; for delivery of the gift cannot in that case be made without including something which forms no part of the gift.†

Rules in case of two or more donees.

7. In the case of a gift made to two or more donees, the interest of each donee must be defined, either at the time of making the gift, or on delivery.‡

* Vide Appendix Tit. Gift 13 to 17.

† Vide Appendix Tit. Deed 7, and Precs. of Gifts, Case III. Also Appendix Gift, 3, 4, 5, 7, 8.

‡ Appendix Tit. Gift 6.

8. A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it. A gift must be express, and must be entirely relinquished by the donor.

9. The cases of a house given to a husband by a wife, and of property given by a father to his minor child, form exceptions to the above rule. Exceptions.

10. Formal delivery and seizin are not necessary in the case of a gift to a trustee, having the custody of the article given, nor in the case of a gift to a minor. The seizin of the guardian in the latter case is sufficient. Of seizin by proxy.

11. A gift on a deathbead is viewed in the light of a legacy, and cannot take effect for more than a third of the property; consequently no person can make a gift of any part of his property on his deathbed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest. Of gift on a deathbed. Vide Wills, p. 53.

12. A donor is at liberty to resume his gift, except in the following instances:* Resumption admissible.

13. A gift cannot be resumed where the donee is a relation, nor where any thing has been received in return, nor where it has received any accession, nor where it has come into the possession of a second donee, or into that of the heirs of the first.† Except in certain cases.

14. Besides the ordinary species of gift, the law enumerates two contracts under the head of gifts, which however more nearly resemble exchange or sale. They are technically termed *Hiba bil Iwuz*, mutual gift, or gift for a consider- Two peculiar kinds of gift.

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* Note.—One obstacle to the resumption of a gift is the death of one of the parties, Case XIV. Vide App. Tit. Gift, 18, 19, 20, and note.

† Vide App. Tit. Gift, 16.

ation, and *Hiba ba shurt ool Iwuz*, gift on stipulation, or on promise of a consideration.

Of Hiba bil Iwuz.

15. *Hiba bil Iwuz* is said to resemble a sale in all its properties; the same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary.*

Of Hiba ba shurt ool Iwuz.

16. *Hiba ba shurt ool Iwuz*, on the other hand, is said to resemble a sale in the first stage only; that is, before the consideration for which the gift is made has been received, and the seizin of the donor and donee is therefore a requisite condition.

* Vide Appendix Tit. Deed. 2, Gift, 2, 9, 10, 11.

CHAPTER VI.

OF WILLS.

1. There is no preference shown to a written over a nuncupative will, and they are entitled to equal weight, whether the property which is the subject of the will be real or personal. Nuncupative and real wills equally valid.

2. Legacies cannot be made to a larger amount than one-third of the testator's estate, without the consent of the heirs. Of legacies.

3. A legacy cannot be left to one of the heirs without the consent of the rest.* To an heir.

4. There is this difference between the property which is the subject of inheritance and that which is the subject of legacy. The former becomes the property of the heir by the mere operation of law; the latter does not become the property of the legatee until his consent shall have been obtained either expressly or impliedly. Distinction between property acquired by inheritance and by will.

5. The payment of legacies to a legal amount precedes the satisfaction of claims of inheritance. Legacies precede claims of inheritance.

6. All the debts due by the testator must be liquidated before the legacies can be claimed. And debts precede legacies.

7. An acknowledgment of debt in favour of an heir on a deathbed resembles a legacy; inasmuch as it does not avail for more than a third of the estate. Acknowledgment of a debt to an heir.

8. It is not necessary that the subject of the legacy should exist at the time of the execution of the will. It is sufficient Of the subject of a legacy.

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* Vide Gifts, p. 51.

for its validity that it should be in existence at the time of the death of the testator.

Of illegal provisions.

9. The general validity of a will is not affected by its containing illegal provisions, but it will be carried into execution as far as it may be consistent with law.

Special rule relative to legatees.

10. A person not being an heir at the time of the execution of the will, but becoming one previously to the testator's death, cannot take the legacy left to him by such will; but a person being an heir at the time of the execution, and becoming excluded previously to the testator's death, can take the legacy left to him by such will.

A legacy may be retracted by implication.

11. If a man bequeath property to one person, and subsequently make a bequest of the same property to another individual, the first bequest is annulled; so also if he sell or give the legacy to any other individual; even though it may have reverted to his possession before his death, as these acts amount to a retractation of the legacy.

Rule in case of excessive legacies.

12. Where a testator bequeaths more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportionate abatement must be made in all the legacies.

And of different legacies to the same person.

13. Where a legacy is left to an individual, and subsequently a larger legacy to the same individual, the larger legacy will take effect; but where the larger legacy was prior to the smaller one, the latter only will take effect.

And of the same legacy

14. A legacy being left to two persons indiscriminately, if one of them die before the legacy is payable, the

whole will go to the survivor; but if half was left to each of them, the survivor will get only half, and the remaining moiety will devolve on the heirs; so also in the case of an heir and a stranger being left joint legatees. to two individuals.

15. Where there is no executor appointed, the father or the grandfather may act as executor, or in their default their executors. Of Executors.

16. A Moohummudan should not appoint a person of a different persuasion to be his executor, and such appointment is liable to be annulled by the ruling power.* Should be Moohummudans.

17. Executors having once accepted cannot subsequently decline the trust. Cannot resign.

18. Where there are two executors, it is not competent to one of them to act singly, except in cases of necessity, and where benefit to the estate must certainly accrue.† Rule where there are two.

* NOTE.—This restriction no longer exists, a Hindoo or a Christian may legally be the executor of a Mahomedan and *vice versa*. Elberling on Inheritance, p. 29, on the authority of S. D. A. Rep. vol. IV. pp. 55, 303. Vide also Appendix Tit. Will, 1, 2.—ED.

† NOTE.—Vide Case VI. Prec. of Guardian and Minority.—ED.

CHAPTER VII.

OF MARRIAGE, DOWER, DIVORCE, AND PARENTAGE.

Definition of marriage.

1. Marriage is defined to be a contract founded on the intention of legalizing generation.

Essentials of.

2. Proposal and consent are essential to a contract of marriage.

Conditions of.

3. The conditions are discretion, puberty, and freedom of the contracting parties. In the absence of the first condition, the contract is void *ab initio;* for a marriage cannot be contracted by an infant without discretion, nor by a lunatic. In the absence of the two latter conditions, the contract is voidable; for the validity of marriages contracted by discreet minors, or slaves, is suspensive on the consent of their guardians or masters. It is also a condition, that there should be no legal incapacity on the part of the woman; that each party should know the agreement of the other; that there should be witnesses to the contract; and that the proposal and acceptance should be made at the same time and place.

Competency of witnesses to.

4. There are only four requisites to the competency of witnesses to a marriage contract; namely, freedom, discretion, puberty and profession of the Moosulmaun faith.

Special rules regarding them.

5. Objections as to character and relation, do not apply to witnesses in a contract of marriage, as they do in other contracts.

Proposal may be made by

6. A proposal may be made by means of agency, or by letter; provided there are witnesses to the receipt of the

message or letter, and to the consent on the part of the person to whom it was addressed. agency, or by letter.

7. The effect of a contract of marriage is to legalize the mutual enjoyment of the parties; to place the wife under the dominion of the husband; to confer on her the right of dower, maintenance,* and habitation; to create, between the parties, prohibited degrees of relation and reciprocal rights of inheritance; to enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife, and to invest the husband with a power of correction in cases of disobedience. Effect of the contract.

8. A freeman may have four wives, but a slave can have two only.† Number of wives.

9. A man may not marry his mother, nor his grand mother, nor his mother-in-law, nor his step-mother, nor his step-grand-mother, nor his daughter, nor his grand-daughter, nor his daughter-in-law, nor his grand-daughter-in-law, nor his step-daughter, nor his sister, nor his foster-sister, nor his niece, nor his aunt, nor his nurse. Enumeration of prohibited relations.

10. Nor is it lawful for a man to be married at the same time to any two women who stand in such a degree of relation to each other, as, that, if one of them had been a male, they could not have intermarried.‡ Additional prohibitions.

11. Marriage cannot be contracted with a person who is the slave of the party, but the union of a freeman with a slave, not being his property, with the consent of the master of Of freemen and slaves.

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* The right of a wife to maintenance is expressly recognized; so much so, that if the husband be absent and have not made any provision for his wife, the Law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation.

† Vide Appendix Tit. Mar. 12.—Ed.

‡ Vide Appendix Tit. Mar. 11. A man may not marry his wife's sister during his wife's life time, unless she be divorced.—Case X. Prec. Mar. and note.—Ed.

such slave, is admissible ; provided he be not already married to a free woman.*

Of the religion of the parties.

12. Christians, Jews, and persons of other religions, believing in one God, may be espoused by Moohummudans.

Presumption of marriage.

13. Marriage will be presumed, in a case of proved continual cohabitation, without the testimony of witnesses ; but the presence of witnesses is neverthelesss requisite at all nuptials.†

Capacity to contract.

14. A woman having attained the age of puberty, may contract herself in marriage with whomsoever she pleases ; and her guardian has no right to interfere if the match be equal.‡

Right of guardians.

15. If the match be unequal, the guardians have a right to interfere with a view to set it aside.

Where an infant contracts.

16. A female not having attained the age of puberty, cannot lawfully contract herself in marriage without the consent of her guardians, and the validity of the contract entirely depends upon such consent.

Limitation.

17. But in both the preceding cases the guardians should interfere before the birth of issue.

Contract when dissoluble by the parties.

18. A contract of marriage entered into by a father or grand-father, on behalf of an infant, is valid and binding, and the infant has not the option of annulling it on attaining maturity ; but if entered into by any other guardian, the infant so contracted may dissolve the marriage on coming of age, provided that such delay does not take place as may be construed into acquiescence.

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* Vide Appendix Tit. Mar. 1.—Ed.

† Vide Appendix Tit. Mar. 10.

‡ Vide Appendix Tit. Mar. 15, 17.

19. Where there is no paternal guardian, the maternal kindred may dispose of an infant in marriage; and in default of maternal guardians the government may supply their place. Of guardians for marriage.

20. A necessary concomitant of a contract of marriage is dower, the maximum of which is not fixed, but the minimum is ten dirms,* and it becomes due on the consummation of the marriage (though it is usual to stipulate for delay as to the payment of a part) or on the death of either party, or on divorce.† Of dower. Minimum of. When due.

21. Where no amount of dower has been specified, the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family. Where no amount fixed.

22. Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand. Whether prompt or deferred.

23. It is a rule that whatsoever is prohibited by reason of consanguinity is prohibited by reason of fosterage; but as far as marriage is concerned, there are one or two exceptions to this rule; for instance a man may marry his sister's foster-mother, or his foster-sister's mother, or his foster-son's sister, or his foster-brother's sister.‡ Disqualification of fosterage and consanguinity. Exceptions.

24. A husband may divorce his wife without any misbehaviour on her part or without assigning any cause; but before the divorce becomes irreversible, according to the most approved doctrine, it must be repeated three times, and be- Of the rules of Divorce.

* The value of the dirm is very uncertain. Ten dirms according to one account make about six shillings and eight pence sterling. See Note to Hamilton's translation of the Hidaya, page 122, volume 1.

† Vide pages XXV and XXVI of the Preliminary Remarks.—Ed.

‡ Note.—If a child previous to completing the age of two years and a half, drink the milk of another mother, her suckling becomes as his brother or sister, and the mother stands in the same relation to him as to her own child; and the same relations whom one is prohibited marrying of his own, he is also prohibited marrying of his foster brother's. After the age of two years and a half, if he suck another mother's breasts it is of no consequence—Qanoon-e-Islam, p. 146. Vide also Case III. Prec. Mar.—Ed.

tween each time the period of one month must have intervened; and in the interval he may take her back either in an express or implied manner.

Conditions precedent to re-union.

25. A husband cannot again cohabit with his wife who has been three times irreversibly divorced, until after she shall have been married to some other individual and separated from him either by death or divorce; but this is not necessary to a re-union, if she have been separated by only one or two divorces.

Of a deathbed divorce.

26. If a husband divorce his wife on his deathbed, she is nevertheless entitled to inherit, if he died before the expiration of the term (four months and ten days) of probation, which she is bound to undergo before contracting a second marriage.

What amounts to a divorce.

27. A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible divorce.*

Of divorce purchased.

28. A wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage.

Another mode of divorce.

29. Another mode of separation is by the husband's making oath, accompanied by an imprecation as to his wife's infidelity, and if he in the same manner deny the parentage of the child of which she is then pregnant, it will be bastardized.

Of Impotency.

30. Established impotency is also a ground for admitting a claim to separation on the part of the wife.

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* There is recognized a species of reversible divorce, which is effected by the husband comparing his wife to any member of his mother, or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. This divorce is technically termed *Zihar*.—Hidaya, book iv. chap. ix.

NOTE.—For particulars regarding divorce Vide the Qanoon-e Islam, pp. 145, 146. Husbands sometimes accede to their wives wish for divorce on condition of their resigning their claims to dower. Ib.—ED.

31. A child born six months after marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of the husband or after divorce. Rules relative to parentage.

32. The first born child of a man's female slave is considered his offspring, provided he claim the parentage, but not otherwise; but if after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part.* Relative to the children of a female slave.

33. If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.† Of acknowledgment of parentage.

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* Note.—Vide Case 17 Prec. In. which shows the son of a female slave can inherit. Vide also Case 7 Prec. Slavery and App. Tit. In. pp. 10, 11, 12, 13.

† Note.—The acknowledgment of parentage alone would not be sufficient to give a bastard by a free woman, a right of inheritance to his reputed father's property. Notes to Cases 11 and 15. App. Tit. In.—Ed.

Note.—For a summary of the law of Marriage Contract, vide note to case 15, App. Tit. Mar.—Ed.

CHAPTER VIII.

OF GUARDIANS AND MINORITY.

Term of minority.

1. All persons, whether male or female, are considered minors until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period.

Subdivision of.

2. There is a subdivision of the state of minority, though not so minute as in the Civil Law, the term minor being used indiscriminately to signify all persons under the age of puberty; but the term *Subee* is applied to persons in a state of infancy, and the term *Moorahiq* to those who have nearly attained puberty.*

Of their privileges.

3. Minors have not different privileges at different stages of their minority, as in the English law.†

Of guardians.

4. Guardians are either natural or testamentary.

Of the same.

5. They are also near and remote. Of the former description are fathers and paternal grand-fathers and their executors and the executors of such executors.

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* "The great distinction therefore was into majors and minors; but minors were again subdivided into *Puberes* and *Impuberes*; and *Impuberes* again underwent a subdivision into *Infantes* and *Impuberes*."—Summary of Taylor's Roman Law, page 124 In the Moohummudan Law a person after attaining majority is termed *Shub* till the age of thirty-four years; he is termed *Kohul* until the age of fifty-one, and *Sheikh* for the remainder of his life.

† The ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor, and at twenty one is at his own disposal, and may alien his lands, goods and chattels A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands.—See Blackstone's Commentaries, vol. 1, page 463.

NOTE.—Puberty is majority in the Mahomedan law. Baillie's Law of Sale, p. 2.—ED.

Of the latter description are the more distant paternal kindred, and their guardianship extends only to matters connected with the education and marriage of their wards.

6. The former description of guardians answers to the term of curator in the Civil Law, and of manager in the Bengal Code of Regulations;* having power over the property of the minor for purposes beneficial to him, and in their default this power does not vest in the remote guardians, but devolves on the ruling authority. Powers of near guardians.

7. Maternal relations are the lowest species of guardians, as their right of guardianship for the purposes of education and marriage takes effect, only where there may be no paternal kindred nor mother. Guardianship of maternal relations.

8. Mothers have the right (and widows *durante viduitate*) to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty. Duration, of mother's controul.

9. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow. Special rules.

10. The paternal relations succeed to the right of guardianship, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor. Right of the paternal relations.

11. Necessary debts contracted by any guardian for the support or education of his ward, must be discharged by him on his coming of age.† Of necessary debts.

12. A minor is not competent *sui juris* to contract marriage, to pass a divorce, to manumit a slave, to make a loan, Disqualifications of a minor.

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* *Vide* Act XIX of 1841 of the Leg. Coun. of India regarding the appointment of Curators.—Ed.

† Note.—Vide 6 Prinl. Debts and Sec. and Case. IV. Prec. of Debts.—Ed.

or contract a debt, or to engage in any other transaction of a nature not manifestly for his benefit, without the consent of his guardian.

Competency of.

13. But he may receive a gift, or do any other act which is manifestly for his benefit.

Of his immoveable property.

14. A guardian is not at liberty to sell the immoveable property of his ward, except under seven circumstances, viz, 1st, where he can obtain double its value; 2dly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3dly, where the late incumbent died in debt which cannot be liquidated but by the sale of such property; 4thly, where there are some general provisions in the will which cannot be carried into effect without such sale; 5thly, where the produce of the property is not sufficient to defray the expenses of keeping it; 6thly, where the property may be in danger of being destroyed; 7thly, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Exceptions.

Of his personal property.

15. Every contract entered into by a near guardian on behalf and for the benefit of the minor, and every contract entered into by a minor with the advice and consent of his near guardian, as far as regards his personal property, is valid and binding upon him; provided there be no circumvention or fraud on the face of it.

Exception.

Responsibility of

16. Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others; though they are not liable in criminal matters to retaliation or to the *ultimum supplicium*, but they are liable to discretionary chastisement and correction.

NOTE.—Executors must act conjointly, not separately, in matters affecting a minor's interests. Prec. of Guard. and Min. Case. VI. Vide Appendix Tig. Guard. I.

CHAPTER IX.

OF SLAVERY.

1. There are only two descriptions of persons recognized as slaves under the Moohummudan Law. First, infidels made captive during war; and, secondly, their descendants. These persons are subjects of inheritance, and of all kinds of contracts, in the same manner as other property. Of legal slavery.

2. The general state of bondage is subdivided into two classes, and slavery may be either entire or qualified, according to circumstances. Slavery entire or qualified.

3. Qualified slaves are of three descriptions: the *Mookatib*, the *Moodubbir*, and the *Oom-i-wulud*. Of qualified slaves.

4. A *Mookatib* slave is he between whom and his master there may have been an agreement for his ransom, on the condition of his paying a certain sum of money, either immediately, or at some future period, or by instalments. Of a *Mookatib* slave.

5. If he fulfil the condition he will become free; otherwise he will revert to his former unqualified state of bondage. In the meantime his master parts with the possession of, but not with the property in him. He is not however in the interval a fit subject of sale, gift, pledge or hire. Rules relative to.

6. A *Moodubbir* slave is he to whom his master has promised *post-obit* emancipation—such promise however may be made absolutely, or with limitation; in other words, the freedom of the slave may be made to depend generally on the Of a *Moodubbir* slave.

death of his master, whenever that event may happen; or it may be made conditionally, to depend on the occurrence of the event within a specified period.

Rules relative to.

7. This description of slave is not a fit subject of sale or gift, but labour may be exacted from him, and he may be let out to hire, and in the case of a female she may be given in marriage. Where the promise was made absolutely, the slave becomes free on the death of the master, whenever that event may happen; and, where made conditionally, if his death occurred within the period specified.

Exceptions to the above general rules.

8. The general law of legacies and debts is applicable to this description of slaves, they being considered as much the right of the heirs as any other description of property: consequently they can only be emancipated to the extent of one-third of the value of their persons, where the master leaves no other property; and they must perform emancipatory labour for the benefit of the heirs to the extent of the other two-thirds; and where the master dies insolvent, they do not become free until, for the benefit of the deceased's creditors, they have earned by their labour, property to the full amount of their value.

Of an *Oom-i-wulud.*

9. An *Oom-i-wulud* is a female slave who has borne a child or children to her master.*

Rules relative to.

10. The law is the same regarding this description of slave as regarding the *Moodubbir*, with this difference in her favor, that she is emancipated unconditionally on the death of her master; whether he may or may not have left other assets, or whether he may have died in a state of insolvency or otherwise. But it should be

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* Note.—Baillie adds, "which he acknowledges as his own. She can no longer be sold." Mah. Law of Sale, p. 17. Such sale is unlawful and the purchaser does not acquire a right of property in her. She may however be lawfully sold to herself. *Ibid*, pp. 162, 163.—Ed.

observed that the parentage of the children of such slave is not established in her master unless he acknowledge the first born.

11. Slaves labour under almost every species of legal incapacity. They cannot marry without the consent of their masters. Their evidence is not admissible nor their acknowledgments (unless they are licensed,) in matters relating to property. They are not generally eligible to fill any civil office in the State, nor can they be executors, sureties or guardians (unless to the minor children of their master by special appointment), nor are they competent to make a gift or sale, nor to inherit or bequeath property. Disqualifications of slaves.

12. But, as some counterpoise to these disqualifications, they are exempted from many of the obligations of freedom. They are not liable to be sued except in the presence of their masters; they are not subject to the payment of taxes, and they cannot be imprisoned for debt. In criminal matters the indulgences extended to them are more numerous. Indulgences granted.

13. Any description of slave however may be licensed, either for a particular purpose or generally for commercial transactions; in which case they are allowed to act to the extent of their license. Of licensed slaves.

14. Masters may compel their slaves to marry. Unqualified slaves may be sold to make good their wives dower and maintenance, and qualified slaves, may be compelled to labour for the same purposes. A man cannot marry a female slave, so long as he has a free wife; nor can he under any circumstances marry his own slave girl, nor can a slave marry his mistress. Rules relative to the marriage of.

Slavery of relations prohibited.

15. Persons who stand reciprocally related within the prohibited degrees cannot be the slaves of each other.

Of the issue of slaves.

16. Where issue has been begotten between the male slave of one person and the female slave of another, the maxim of *partus sequitur ventrem* applies, and the former has no legal title to the children so begotten.

Question as to a person's selling himself into slavery.

17. It is a question how far the sale of a man's own person is lawful when reduced to extreme necessity. It is declared justifiable in the *Moheet oo-surukhsee,* a work of unexceptionable authority. But while deference is paid to that authority, by admitting the validity of the sale, it is nevertheless universally contended that the contract should be cancelled on the application of the slave, and that he should be compelled by his labour to refund the value of what he had received from his purchaser.

Of servitude.

18. It is admitted however by all authorities that a person may hire himself for any time, even though it amount to servitude for life; but minors so hired may annul the contract on attaining majority.

NOTE.—Baillie's Law of Sale throws great light on the law of slavery.—ED.

NOTE.—Slavery was abolished throughout British India by Act V. of 1843.—ED.

CHAPTER X.

OF ENDOWMENTS.

Definition of an endowment.

1. An endowment signifies the appropriation of property to the service of God; when the right of the appropriator becomes divested, and the profits of the property so appropriated are devoted to the benefit of mankind.*

Rules relative to.

2. An endowment is not a fit subject of sale, gift or inheritance; and if the appropriation be made *in extremis*, it takes effect only to the extent of a third of the property of the appropriator. Undefined property is a fit subject of Endowment.

Sale of—when allowable.

3. Endowed property may be sold by judicial authority, when the sale may be absolutely necessary to defray the expense of repairing its edifices or other indispensable purpose, and where the object cannot be attained by farming or other temporary expedient.†

Grant of—to a person not in existence.

4. In case of the grant of an endowment to an individual with reversion to the poor, it is not necessary that the grantees specified shall be in existence at the time. For instance, if the grant be made in the name of the children of A with reversion to the poor, and A should prove to have no children, the grant will nevertheless be valid, and the profits of the endowment will be distributed among the poor.

Superintendent of—not removable *quamdiu se bene gesserit.*

5. The ruling power connot remove the superintendent of an endowment appointed by the appropriator, unless on proof of misconduct; nor can the appropriator himself remove such person, unless the liberty of doing so may have been

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* Vide App. Tit. End. 5, 8, 10, 11, 12, 13.

† Vide App. Tit. End. 24. Vide also 38, wherein it was ruled that the alienation, temporary or absolute, by mortgage or otherwise, of Wakf lands, though for the repair or other benefit of the Endowment, is illegal.—Ed.

specially reserved to him at the time of his making the appropriation.

Of the succession to.

6. Where the appropriator of an endowment may not have made any express provision as to who shall succeed to the office of superintendent on the death of the person nominated by himself, and he may not have left an executor, such superintendent may, on his death bed, appoint his own successor, subject to the confirmation of the ruling power.*

Rules relative to the management of.

7. The specific property endowed cannot be exchanged for other property, unless a stipulation to this effect may have been made by the appropriator, or unless circumstances should render it impracticable to retain possession of the particular property, or unless manifest advantage be derivable from the exchange; nor should endowed lands be farmed out on terms inferior to their value, nor for a longer period than three years, except when circumstances render such measure absolutely necessary to the preservation of the endowment.

Cases in which the will of the founder may be contravened.

8. The injunctions of the appropriator should be observed except in the following cases: If he stipulate that the superintendent shall not be removed by the ruling authorities such person is nevertheless removable by them on proof of misconduct. If he stipulate that the appropriated lands shall not be let out to farm for a longer period than one year, and it be difficult to obtain a tenant for so short a period, or, by making a longer lease, it be better calculated to promote the interests of the establishment, the ruling authorities are at liberty to act without the consent of the superintendent. If he stipulate that the excess of the profits be distributed among persons who beg for it in the mosque, it may nevertheless be distributed in other places and

* Vide Appendix Tit. Endow. 1, 25, 26, 27, 29.

among the necessitous, though not beggars. If he stipulate that daily rations of food be served out to the necessitous, the allowance may nevertheless be made in money. The ruling authorities have power to increase the salaries of the officers attached to the endowment, when they appear deserving of it, and the endowed property may be exchanged, when it may seem advantageous, by order of such authorities; even though the appropriator may have expressly stipulated against an exchange.

Case of two superintendents.

9. Where an appropriator appoints two persons joint superintendents, it is not competent to either of them to act separately; but where he himself retains a moiety of the superintendence, associating another individual, he (the appropriator) is at liberty to act singly and of his own authority in his self-created capacity of joint superintendent.

General rule for public and private endowments.

10. Where an appropriation has been made by the ruling power, from the funds of the public treasury, for a public purposes, without any specific nomination, the superintendence should be entrusted to some person most deserving in point of learning; but in private appropriations, with the exceptions above mentioned, the injunctions of the founder should be fulfilled.

NOTE.—Vide Regulation VIII. of 1817, the law applicable to endowments in the Madras Presidency.

Vide App. Tit. *Tawliyat* 1.

NOTE.—In No. 37 App. Tit. End. a case is reported wherein it was held that on the disappearance of a Mosque the Wakf impropriation had virtually determined.—E[illegible]

CHAPTER XI.

OF DEBTS AND SECURITIES.

Responsibility of heirs.

1. Heirs are answerable for the debts of their ancestors, as far as there are assets.*

Of debts acknowledged on a deathbed.

2. The payment of debts acknowledged on a deathbed must be postponed until after the liquidation of those contract in health, unless it be notorious that the former were *bonâ fide* contracted; and a deathbed acknowledgment of a debt in favor of an heir is entirely null and void, unless the other heirs admit that it is due.

Case of two persons jointly contracting a debt.

3. If two persons jointly contract a debt and one of them die, the survivor will be held responsible for a moiety only of the debt; unless there was an express stipulation that each should be liable for the whole amount: for the law presumes that each were equal participators in the profits of the loan, and that one should not be responsible for the share of advantage acquired by the other.†

And being joint sureties.

4. So also where two persons are joint sureties for the payment of a debt, if one of them die, the survivor will not be considered as surety for the whole debt; unless there was an express stipulation that each should be surety for the whole, and that the one should be surety of the other.

In certain cases partners are jointly and severally responsible.

5. It is different where two partners are engaged in traffic, contributing the same amount in capital, and being equal in all respects, in which case the one partner is responsible for all acts done and for all debts con-

* Vide Appendix Tit. Debts 1, 4.

† Note.—Vide note at page 350.

tracted by the other. But this is not the case with regard to other partnerships, in which cases a creditor of the concern cannot claim the whole debt from any one of the partners severally, but must either come upon the whole collectively, or if he prefer his claim against any one individual partner, it must be only to the extent of his share.

6. Necessary debts contracted by a guardian on account of his ward must be discharged by the latter on his coming of age. Of necessary debts contracted by guardians.

7. A general inhibition cannot be laid on a debtor to exclude him entirely from the management of his own affairs; but he may be restrained from entering into such contracts as are manifestly injurious to his creditor. Inhibition of debtors.

8. If a debtor, on being sued, acknowledge the debt, he must not be immediately imprisoned; but if he deny, and it be established by evidence, he should be committed forthwith to jail. Proof of debt by confession and by evidence.

9. If, after judgment, there should be any procrastination on the part of a debtor who has been suffered to go at large, and he may have received a valuable consideration for the debt, or if it be a debt on beneficial contract, he should be committed to jail notwithstanding he plead poverty. Case of procrastinating debtors.

10. But if the debt had been contracted gratuitously and without any valuable consideration having been received (as in the case of a debt contracted by a surety on account of his principal), the debtor should not be imprisoned unless the creditor can establish his solvency. Special rule in certain cases.

Imprisonment how determinable.

11. It is left discretionary with the judicial authorities to determine the period of imprisonment in cases of apparent insolvency.

Liberation no bar to subsequent arrest.

12. But the liberation of a debtor does not exempt him from all future pursuit by his creditors. They may cause his arrest at a subsequent period, on proof of his ability to discharge the debt.

Of attachment and sale.

13. In the attachment and sale of property belonging to a debtor, great caution is prescribed. In the first instance, his money should be applied to the liquidation of his debt; next, his personal effects, and last of all his houses and lands.

Of mortgages and pledges.

14. There is no distinction between mortgages of lands and pledges of goods.

Of Hypothecation.

15. Hypothecation is unknown to the Moohummudan Law, and seizin is a requisite condition of mortgage.*

Of mortgages.

16. The creditor is not at liberty to alienate and sell the mortgage or pledge at any time, unless there was an express agreement to that effect between him and the debtor, as the property mortgaged is presumed to be equivalent to the debt, and as the debt cannot receive any accession, interest being prohibited.

Obligations of mortgager and mortgagee.

17. It is a general rule that the pawnee is chargeable with the expense of providing for the custody, and the pawner with the expense of providing for the support of the thing pledged; for instance, in the case of a pledge of a horse, it is necessary that the pawner should provide his food, and the pawnee his stable.

Mortgagee cannot use the pledge.

18. Where property may have been pawned or mortgaged in satisfaction of a debt, it is not lawful for the

* Note.—This rule is not respected in practice, and mortgages, without seizin, are as prevalent among Mahomedans as among Hindus. The same observation occurs in Macpherson's Treatise on the Law of Mofussil Mortgages Introy. Chap. p. 5.—Ed.

pawnee or mortgagee to use it without the consent of the pawner or mortgager, and if he do so, he is responsible for the whole value.

19. Where such property, being equivalent to the debt, may have been destroyed, otherwise than by the act of the pawnee or mortgagee, the debt is extinguished; where it exceeds the debt, the pawnee or mortgagee is not responsible for the excess, but where it falls short of the debt, the deficiency must be made up by the pawner or mortgager; but if the property were wilfully destroyed by the act of the pawnee or mortgagee, he will be responsible for any excess of its value beyond the amount of the debt. Mortgage destroyed in the mortgagee's hands.

20. If a person die, leaving many creditors, and he may have pawned or mortgaged some property to one of them, such creditor is at liberty to satisfy his own debt out of the property of the deceased debtor, which is in his own possession, to the exclusion of all the other creditors. Privilege of a mortgagee.

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* Note I.—No distinction exists, except as regards pledges and mortgages, with respect to priority of debts. Simple and bond debts are on an equal footing. Vide Cases I and III Prin. of Debts.

Note II.—The Mahomedan Law of Contracts is not binding on the Mofussil Courts. Vide Cl. 1, Sec. XVI. Reg. III. of 1802 (Madras Code), but nevertheless is entitled to respect, because "its principles naturally govern the transactions of the people with one another." Strange's Manual of Hindu Law, p. 73, and Baillie's Preliminary Remarks on the Law of Sale, p. X.

Note III.—The law of Mortgage is subject to such modifications as have been introduced by the practice of the Mofussil and Sudr Courts founded on the regulations of the British Government. Macpherson's Introduction to his Treatise on the Law of Mortgage.—Ed.

CHAPTER XII.

OF CLAIMS AND JUDICIAL MATTERS.

No limitation. 1. There is no rule of limitation to bar a claim of right according to the Moohummudan Law.*

Parole and writing equally valid. 2. A claim founded on a verbal engagement is of equal weight with a claim founded on a written engagement.

Of informal deeds. 3. Informality in a deed does not vitiate a contract founded thereon, provided the intention of the contracting parties can otherwise be clearly ascertained.†

Of priority. 4. The general rule with respect to all claims is that priority in point of time confers superiority of right.

Conflicting claims of purchase and gift. 5. Where the priority of either cannot be ascertained, a claim founded on purchase is entitled to the preference over a claim founded on gift.

Contracts generally devolve. 6. Contracts are not dissolved generally by the death of one of the contracting parties, but they devolve on the representatives as far as there may be assets; unless the subject of the contract be of a personal nature, such for instance as in the case of a lease, if either the landlord or farmer die, the contract ceases on the occurrence of that event.

Exceptions.

Additional exception. 7. So also in the case of partnership and joint concerns of any description, where the surviving partners

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* In the *Buhroorayiq* an opinion is cited from the *Mubsoot*, to the effect that if a person causelessly neglect to advance his claim for a period of thirty-three years, it shall not be cognizable in a court of justice; but this opinion is adverse to the received legal doctrine.
Vide App. Tit. Limit. 1.

† For the construction of ambiguous expressions. Vide App. Tit. End. 11.

are not bound to continue in business with the heirs of the deceased partner, and *vice versâ;* and the obligation is extinguished, as well by civil as by natural death.

8. Oaths are not administered to witnesses. Of witnesses.

9. In civil claims the evidence of two men or one man and two women is generally requisite. Their number.

10. Slaves, minors and persons convicted of slander are not competent witnesses. Incompetent witnesses.

11. The evidence of a father or grand-father, in favor of his son or his grand-son, and *vice versâ;* of a husband* in favor of his wife, and *vice versâ;* and of a servant in favor of his master, and *vice versâ,* is not admissible. Inadmissible evidence.

12. Nor is the evidence of a partner admissible in matters affecting the joint concern. Of the same.

13. In matters which fall peculiarly within the province of women, female evidence is admissible, uncorroborated by male testimony. Female evidence, where admissible.

14. Hearsay evidence is admissible to establish birth, death, marriage, cohabitation and the appointment of a Kazee; as the eye witnesses to such transactions are frequently not forthcoming. And hearsay evidence.

15. No respect is paid to any superiority in the number of witnesses above the prescribed number adduced in support of a claim. Superfluous evidence.

16. The evidence of witnesses which tends to establish the plaintiff's claim to any thing not contained in his own statement, must be rejected; for instance, if any of his witnesses Of evidence exceeding the claim.

* *Vide* Appendix Tit. Mar. 9. Wherein a husband was allowed to give evidence in favor of his wife before the Supreme Court of Calcutta. Sec. 18, Act II. of 1855 removes incompetency by reason of relationship and interest. Mr. Fulton's note in the above case is worthy of attention.—Ed.

depose to a larger sum being due to him than that claimed by himself.

And differing as to the ground of action.

17. The evidence of witnesses which tends to establish the plaintiff's claim on a ground different from that alleged by himself, must be rejected; for instance, if the plaintiff were to claim by purchase and his witnesses were to depose to his claim being founded on gift.

Where it differs as to the amount due.

18. Where a debt is claimed, and some of the witnesses depose to the debt of the whole sum claimed and others to a part of it only, the plaintiff is entitled to such part only of the sum claimed.

Of the general issue.

19. Where a defendant pleads the general issue, the *onus probandi* rests on the plaintiff.

Of a special plea containing defensive matter.

20. Where a plea contains defensive matter, such as payment or satisfaction, the *onus probandi* rests on the defendant; the rule being the same as in the Civil Law, that in every issue the affirmative is to be proved.

Of the junction of a special plea and the general issue.

21. A defendant may in some cases plead both the general issue and a special plea, where they are not inconsistent; and the *onus probandi* in such case rests on the plaintiff, where the special plea is not necessary to the defence; for instance, a man sues another for half an estate, alleging that he was born in wedlock of the same father and mother as the defendant. Here the defendant may deny the allegation generally, and at the same time plead that the plaintiff was born of a different family.

A claim at variance with a

22. A claim is not admissible which may be repugnant to a former claim, both of which cannot stand;

for instance, a person in a former suit having denied that a certain individual was his brother, cannot subsequently claim the inheritance of that person on the plea of such relation. former one inadmissible.

23. But if the claim be at variance with a former one, and they can both consistently stand, it is admissible; for instance, a claim having been advanced to property in virtue of purchase, the same property may be claimed by the same person in virtue of inheritance, but if the claim of inheritance had been prior, a subsequent claim of purchase is not admissible; as it is manifest that they cannot both consistently stand.* Unless they can both consistently stand.

24. If a man adduce a claim and have no evidence to support it, the general rule is, that the defendant must be put to his oath, and if he decline swearing, judgment should be given for the plaintiff; but if he deny on oath, he is absolved from the claim. Rule where the plaintiff has no evidence.

25. Where both parties have evidence, that of the plaintiff is generally entitled to preference. Thus for instance, where the creditor and debtor are at issue as to the amount of a debt, and both parties have evidence, that of the former is entitled to preference, but where neither party has evidence, the assertion on oath of the latter is to be credited. And where both parties have evidence. Examples.

26. It is also a general principle that where there is evidence adduced on both sides, *cæteris paribus*, the preference should be given to the witnesses of the party whose claim is greater, Additional rule where both parties have evidence.

* At first sight there might appear to be a distinction without a difference in this case; but the reason of the rule is that an heir might consistently make a purchase of property which had not devolved, but of which he was in expectancy. But it is contrary to all probability that he should have purchased, after the demise of the ancestor, property to which he had represented himself actually entitled in virtue of inheritance.

or who has the greater interest in the subject matter. Thus, for instance, in an action arising out of a contract of sale, where there is a disagreement about the price between the seller and purchaser, both parties having evidence, the witnesses who depose to the larger sum being due, that is of the plaintiff, are entitled to preference.

Example.

Case of sale, the parties being at issue both as to the price and the goods, and each having evidence.

27. And where there is a disagreement, both as to the price and goods, both parties having witnesses, the evidence adduced by the seller is entitled to preference, as far as it affects the amount of the price, and that of the purchaser as far as it affects the quality and quantity of the goods.

And where neither has evidence.

28. If neither party have evidence, they should both be put to their oaths, and if both consent to swear, the contract must be dissolved; but if one decline and the other swear, the decree should be passed in favor of the swearer.

And where they are at issue as to the condition of a sale.

29. But if the disagreement exist with respect to the conditions only of a sale, such as the period of payment, &c., and both parties consent to swear, the assertion on oath of the party against whom the claim is made is entitled to preference.

Suit between husband and wife, or between lessor and lessee.

30. Where a husband and wife dispute as to the amount of dower, both parties having evidence, that of the wife must be credited, as it proves most;* so also in a dispute between a lessor and lessee, the evidence of each party is entitled to preference as far as their

* But there is an exception to this general rule. If the proper dower of the wife, that is to say the average rate of dower paid to her paternal female relations, exceed the amount claimed by her, the evidence adduced by the husband is entitled to preference, because that goes to prove some remission on her part. See Hidaya, vol. 1st, page 154.

individual interests are at stake; the evidence of the lessor being received as to the amount of the rent, and that of the lessee as to the duration of the term.

31. Where property is claimed and the person in whose possession it is, states that he is merely a depositary or pawnee of an absent proprietor, and adduces evidence in support of his assertion, the claim must be dismissed; but the claim should be rejected *in limine* where the claimant admits his title to have been derived from such absentee proprietor. Claim of property in deposit or in pledge.

32. Judgment cannot be passed *exparte*, the reason given being, that decisions must be founded either on the defendant's confession, or (notwithstanding his denial) on proof by witnesses; and where he is absent, it cannot be said whether he would have denied or admitted the claim. Of *exparte* Judgment.

33. When cases are referred to arbitration, it is requisite that the decision of the arbitrators should be unanimous.* Of arbitration.

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* NOTE 1ST.—When a person possessed of sound mind makes an acknowledgment of right, such acknowledgment is binding upon him and cannot be retracted to the prejudice of the party in whose favor it was made. Vide Case VII Prec. of Sale.

NOTE 2ND.—Acts II. and X. of 1855 constitute the Law of Evidence in the Indian Courts. Mr. Norton's excellent work on the subject is the chief Text Book.

NOTE 3RD.—In Madras the concurrence of the majority is sufficient to render an award of a Punchayet valid—Act VIII. of 1840.—ED.

PRECEDENTS

OF

Moohummudan Law

RELATIVE TO

INHERITANCE, CONTRACTS, AND MISCELLANEOUS SUBJECTS.

CHAPTER I.

PRECEDENTS OF INHERITANCE.

CASE I.

QUESTION 1. A person dies leaving three sons. In what proportions will they inherit the property left by him?

REPLY 1. The property will be made into three portions, of which each son will take one.* Sons inherit equally.

Q. 2. Supposing that person to have divided his property during his lifetime between two of his three sons, and that those two sons and their heirs had possession of the property so given to them, in this case will the third son have a legal claim to any part of the property so disposed of?

R. 2. If the father was in sound disposing mind, when he divided his property, giving distinct portions to each of his two sons, and they retained separate possession of their respective portions, the third son will not be entitled to any part of the property. But the father may disinherit any one of his sons during his lifetime.

* See Principle of Inheritance, 2.

CASE II.

Q. The plaintiff sues her younger brother to recover the proprietary right to a sixteenth share of certain lands, the property of her deceased elder brother. It appears that those lands were not ancestral, but entirely self-acquired, and that on the death of the proprietor his family consisted of a daughter, a widow, two brothers and two sisters. Under these circumstances, are the sisters, on the death of the proprietor, entitled to participate in his personal acquisitions, and admitting that they are entitled, under these circumstances, could they have any just claim, supposing the proprietor had left a son ?

No distinction between ancestral and acquired property.

R. All the property of the deceased proprietor must on his death be distributed among his two brothers, his two sisters, his widow, and his daughter. The law in this respect recognizes no distinction between property which has descended from ancestors and property obtained by personal acquisition.* Under these circumstances therefore, the sisters of the deceased are entitled to participate in the estate acquired by him. If the deceased proprietor had left a son, both his brothers and his sisters would have been excluded† from the inheritance, and would not have been entitled to any share. The property would in that case have devolved exclusively on the son and daughter and widow; the widow taking an eighth‡ as her legal share, and the residue being divided between the son and daughter, in the proportion of a double share to the male.§

Sisters inherit with brothers and daughters.

Both brothers and sisters are excluded by a son.

CASE III.

Q. A woman dies leaving property which she obtained by inheritance from her husband and son. Will such property devolve on the relations of her husband

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* See Prin. Inh. 1. † 21. ‡ 14. § 3.

and son, who are not relations of the woman herself, or on her father? and is there any distinction between real and personal property in such a case of inheritance?

R. The property which the widow obtained by inheritance from her husband and son, will not devolve on the relations either of her husband or her son, who are not her relations; but it will devolve on her father, brothers, or other relations, who may be her lawful heirs; and there is no* distinction between real and personal property in such case; but it will all be inherited in the same manner. The enumeration of heirs, as laid down in the *Surajya* is as follows:—"They begin with the persons entitled to shares, then they proceed to the residuary heirs by relation, then they return to those entitled to shares according to their respective rights of consanguinity, then to the more distant kindred, then to the successor by contract, then to him who was acknowledged as a kinsman through another, then to the person to whom the whole property was left by will, and lastly to the public treasury." But the relations of the husband and son of a woman (not being her own relations,) do not come within the description of any of the heirs enumerated.

The property (however acquired) of a woman devolves on her own heirs.

No distinction between real and personal property.

CASE IV.

Q. Are the offspring of slave girls entitled to inherit the estate of their father?

R. All the children of a person deceased, whether they are the offspring of a slave girl or a free married woman, are without distinction entitled to succeed to their respective shares, according to the law of inheritance.†

The children by slave girls inherit equally with other children.

* Prin. Inh. 1.

† But to establish the parentage of children by slave girls it is necessary that the father should acknowledge them, if they are by different mothers; but if they are by the same mother, the acknowledgment of the first born is sufficient. —See Principles of Parentage, 32.

NOTE TO CASE IV.—The son of a Mahomedan by a slave girl, if acknowledged by his father is entitled to inherit. Morley's Digest, p. 190, Ben. S. D. A. 17th January 1848. Vide also App. Tit. In. 10, 11, 12, 13, 70.

CASE V.

Q. If, according to the allegation of the widow, her adversary became an apostate from the Moohummudan faith subsequently to the demise of her husband, will this circumstance exclude him from the inheritance?

Apostacy after the death of an ancestor is no bar to inheritance.

R. If the apostacy occurred, as stated, subsequently to the demise of the husband, his brother will not thereby be excluded from his right as heir, because, when the inheritance devolved, he was of the same religion as her deceased husband.*

CASE VI.

Q. What conditions are necessary to the validity of an adoption, according to the Moohummudan Law, and what rights appertain to a person legally adopted? Has he any claim of inheritance to the property left by his adopting father, or is the adopting father at liberty to dispose of all his property by sale, or gift, during his lifetime, and thereby to leave his adopted son entirely destitute?

Adoption confers no right of inheritance.

R. During the lifetime, or after the death of the adopting father, the adopted son has no claim upon his property.† The adopting father's control over his own

* Difference of religion is one impediment to inheritance.—See Prin. Inh. 6.—Vide App. Tit. Inh. 69.

† By the term adoption here used, affiliation by distinct claim of parentage is not intended, but merely the reception, by the adopting father, into his family, of a child, who notoriously and avowedly belongs to another family. In this particular the Moohummudan seems to agree with the English, and the Hindoo with the Roman Law. Adoption among the Romans, as among the Hindoos at this day, was intimately connected with religious or superstitious notions, and "it was thought disgraceful not to keep up and preserve the domestic gods and sacred things of the family." Whereas among ourselves and among the Moohummudans, it seems to have been suggested, to use an expression of Dr. Taylor, merely as a resource of orbity. The same learned author, in a note to his chapter on adoption, observes—"It is not unusual, we all know even among us, for friendship to adopt in effect, the children of strangers in blood; but here is the plain difference between such acts of friendship and the legal adoption of the Romans: the friend and intended benefactor may change his mind when he

property is absolute, and although the adopted son may be thereby left entirely destitute, he is at liberty to dispose of his property as he pleases, by sale, gift, or otherwise.

CASE VII.

Q. Supposing the claimant in this case to have been arraigned and convicted on suspicion of the murder of the woman to whose property he lays claim as lawful heir, will this circumstance exclude him from the inheritance?

R. Mere suspicion of murder is not sufficient to exclude from the right of inheritance. Unless the crime be fully established, the suspected person has a right to succeed to the property as heir, supposing his title to the inheritance to be otherwise unexceptionable.*

Suspicion of murder, not fully proved, does not exclude from inheritance.

CASE VIII.

Q. A Moosulmaun is involved in debt, by having become security for another. On his death are his heirs liable to pay the debt, without reference to the amount of the property which they may have inherited from him, and are they answerable for the debt, supposing the deceased to have left

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pleases, but the adopted child at Rome obtained by the adoption legal rights of inheritance and succession to the adoptor, of which he could not be arbitrarily or wantonly dispossessed."—Summary of Taylor's Roman Law, vol. 1, page 74.—Vide App. Tit. Adop. 1, 2.

* The claimant in this case was probably convicted under the absurd rules of evidence observed in the Moohummudan Criminal Law, by which an accused person was convicted and punished, not according to the offence of which he had been guilty, so much as according to the quantum of evidence adduced against him. It appears that the claimant was sentenced to 12 years' imprisonment on *suspicion* of the murder with which he was charged; and to justify exclusion from inheritance, complete proof is requisite. It may here be observed that homicide, of whatever description, however accidental, if fully proved, excludes the person who committed it from inheriting the property of the person slain, provided he was the cause, but not if he was the occasion merely. See Prin. Inh. 6.

Vide App. Tit. Inh. 67.

no property? if so, the heirs being two brothers, a nephew and a son, which of them is liable?

Heirs are answerable for the debts of their ancestors, as far as there are assets, but no farther.

R. If the debtor left property at his death, the creditor may claim his debt from the heir of the deceased, who has become possessed of the property left; and the debts of a deceased person must be liquidated, before claims of inheritance can be satisfied. If the amount of the property exceed the amount of the debts, the heirs will share the residue; but if the property fall short of the amount of the debts, the whole of it must be appropriated to their liquidation, and the heirs will then not be responsible for what remains due. If the deceased left no property, the claim of the creditors will not lie against his heirs. If at the death of the debtor he leave a son, two brothers, and one brother's son, the former will be liable, and the residue, after the creditors shall have been satisfied, will devolve entirely on him, according to law. The brother and brother's son cannot inherit any of the property during his lifetime.*

CASE IX.

Q. A woman has two sons. One of them dies in the lifetime of his mother, leaving a daughter. After the woman's death, that daughter lays claim to the property left by her in right of her father. Will her claim be good against the brother of her deceased father, that is to say, her uncle?

Claim to inherit through a deceased person not admissible.

R. The daughter can have no claim against her uncle, because her father died in the lifetime of his mother, who has another son living, by whom the daughter is excluded. She can therefore have no claim of inheritance to the property of her grand-mother.†

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* See Prin. Inh. 21. † 9.
Vide App. Tit. Inh. 71.

CASE X.

Q. Supposing any of the heirs to be insane or blind, do these circumstances operate to preclude them from inheritance?

R. Mental derangement, or any description of insanity, and blindness, are not among the impediments to succession; but persons afflicted in this manner are entitled to their legal shares as other heirs.* **Insanity and blindness do not disqualify from inheriting.**

CASE XI.

Q. Two women during the lifetime of their mother execute a deed in favour of two other heirs, renouncing their right of inheritance to their mother's property. They each received one thousand rupees from the persons in whose favour they executed the deed, and for a period of nearly twelve years after their mother's death they advanced no claim; but ultimately sued for their legal shares of the property left by their mother. An alleged deed of gift by the mother to the persons in whose favour the renunciation was made, and of which mention is made in the deed executed by the two women, is proved on investigation never to have existed. Under these circumstances will the deed of renunciation executed by the women be any bar to their present claim?

R. †Renunciation implies the yielding up a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. It is evident that, during the **Renunciation of inheritance in lifetime of ancestor, null and void.**

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* Both the causes here mentioned operate to exclude from the inheritance agreeably to the provisions of the Hindoo Law:—"Eunuchs and outcasts, persons born *blind* or deaf, *madmen*, *idiots*, the dumb and such as have lost the use of a limb, are excluded from a share of the heritage."—Sir W. Jones's translation of the Institutes of Munoo, Chapter IX. § 201. But these absurd provisions seem to be entirely obsolete in the present day.

† Vide App. Tit. 74.

lifetime of the mother, the daughters have no right of inheritance, and their claim on that account is not maintainable against any person during her lifetime. It follows therefore that this renunciation, during the mother's lifetime, of the daughters' shares is null and void; it being in point of fact giving up that which had no existence. Such act cannot consequently invalidate the right of inheritance supervenient on the mother's death, or be any bar to their claim of the estate left by her. The omission to advance a claim for a period of nearly twelve* years is no legal bar to the ultimate admission of such claim.†

No limitation to claim of.

CASE XII.

Q. A person contracted marriage with a woman, who was his equal in point of circumstances, and against whom there was no legal objection. He had a family of children by this marriage. He afterwards connected himself with a dancing woman, to whom however he was not married, and by her also he had several children. He died without making a will, and the question is, whether his children by the unmarried woman above alluded to, are entitled to any portion of his estate, or

* The limitation of twelve years fixed by Section XIV. Regulation 3, 1793, Section VIII. Regulation 7, 1795, and Section XVIII. Regulation 2, 1803, modified by Section III. Regulation 2, 1805, may perhaps be held to supersede the Moohummudan Law in this particular; but there certainly do appear to be claims, such for instance as a claim to dower, the non-adducement of which within a certain period, it would be harsh to pronounce a ground for being not cognizable.

† Futwas similar in purport to the above were delivered on this occasion by the Cauzee of the Provincial Court and the Mooftee of the City Court of Patna; but a contrary opinion was delivered by the Mooftee attached to the Zillah Court of Shahabad, to whom also the point was referred. He maintained that the execution of the deed for which a consideration had been received by the obligors was binding against them, although the right parted with was not in existence at the time. The question however having been ultimately referred to the Law Officers of the Sudder Dewanee Adawlut and other learned authorities, it was satisfactorily ascertained that the opinion of the majority was a correct exposition of the law.

whether the whole of it should devolve on his widow and the children begotten by him in wedlock?

R. Under the circumstances stated, if a marriage be not proved to have taken place between the deceased and the dancing woman in question, and if it be evident that her children are the fruit of fornication, their parentage will not be established in the deceased; according to the saying of the prophet—"Offspring belong to such as have *consorts*, but fornicators are prohibited from laying claim." Consequently the parentage not being established, and there being no will, no part of the property of the deceased belongs to the illegitimate children, but the whole will go to those born in wedlock. It is laid down in the *Kafee*—"The offspring of fornication and the offspring repudiated by *laan* or imprecation, take the maternal estate only,* but not the paternal, nor can the father inherit from them. The father of such offspring cannot be considered as standing in any degree of relation to them, and their relation to the father being cut off, they are consequently excluded from claiming relation with his family." It is also laid down in the *Hummadeea* that the parentage of the fruit of fornication is not established in the father.

Illegitimate children do not inherit their father's property.

CASE XIII.

Q. A person died, leaving certain landed property, and four sons, two of whom died childless. The survivors, A and B, lived in joint possession of the estate. B afterwards died, leaving two sons, C and D, and two daughters, E and F. These persons remained with their uncle and his sons G and H, as joint proprietors of the lands in question. A then died, and the survivors still continued to live together on the same terms—afterwards C and G successively died, and D has since disappeared, nor can any tidings of him be obtained.

* Vide App. Tit. Inh. 70.

Last of all H died, leaving a widow, who is the only present surviving claimant except the daughters of B. In what proportions will these persons respectively be entitled to inherit the estate?

R. Under these circumstances, the estate should be made into sixteen portions, of which the widow of H is entitled to two, and E and F to seven, or three and a half each. The remaining seven shares, which properly belong to the missing person D, should not immediately devolve on any of the other heirs; but four shares of it should be deposited in the hands of a trustee, and the remaining three should be entrusted to the person or persons in possession of the rest of the property, to be kept until the expiration of the period allowed for the re-appearance of the missing person. This period is ninety years reckoning from his birth. If he re-appear in this interval, the whole seven shares should be made over to him, but if no intelligence of his fate can be obtained before the expiration of the above period, his heirs will inherit the four shares which were deposited in the hands of a trustee, and the remaining three shares will devolve on the other heirs who came into possession at the former distribution.*

Property of missing persons should be kept in abeyance for ninety years from the time of their birth.

They cannot inherit, or be inherited of, during this interval.

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* The Principle of the Law laid down in this case is, that a missing person is considered defunct, as far as regards the property of others, and living, as far as regards his own property. He shall not inherit from others during the period of ninety years which is allowed for his re-appearance, nor shall others inherit from him during this interval.

The surviving representatives of B were D and E and F, and the surviving representative of A was H. The first three persons were entitled to eight shares of the property in right of their father B, and the last mentioned to eight in right of his father A; but of the first eight shares D, by virtue of his being a male, was entitled to four, and E and F to two shares each. After D disappeared, H died, leaving a widow who was entitled to two shares only of his eight portions, and the remaining six devolved on the children of his paternal uncle B; of which six, D as male, was entitled to three or a double portion, but it being a rule that a missing person is to be considered living as to his own property, and defunct as to the property of others, after the disappearance of D, his four shares, which descended to him absolutely from his father, and of which he was in possession before he disappeared, should be placed in the hands of trustees, and the three

CASE XIV.

Q. Supposing Mussummaut Buhorun to have been the wife of Ruhm Ali, will the property left by him go to both his widows, namely, Mussummaut Buhorun and Mussummaut Bheekun equally, or in what proportions; according to law are their rights equal or different?

Widows share equally.

R. In case of there being children, an eighth share of the husband's property goes to the widow, and in case of there being no children, a fourth. In both cases the widows will share equally.*

CASE XV.

Q. What is the nature of the contract of marriage, and what are the conditions, by the existence of which a woman becomes entitled to succeed to her husband's property on his death?

Conditions of a legal marriage.

R. The term *uqud*, or contract, in a strict sense signifies tying together; and the joining of two persons in matrimony is termed a contract of marriage. The proposal and consent of the parties are essential to the contract. The bride should express consent if she be adult, and the guardians and witnesses should be present at the ceremony. Under these circumstances, the wife is competent to inherit her husband's property, supposing her not to have been divorced from him, not to have killed her husband, not to be the slave of any one, and not to be of a different religion. Such a widow takes an eighth where there are children, and a fourth where there are none.† The remainder goes to the legal sharers, in default of them to the residuary heirs, in default of them to

Impediments to a wife's succession.

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shares which would devolve on him only in the event of his proving to have been alive at the date of the death of his cousin H, should be given to the other heirs, to be enjoyed by them, subject only to the condition of the re-appearance of the missing person.

* See Prin. Inh. 14. † 14.

the distant kindred, and in their default it escheats to the public treasury.

CASE XVI.

Q. A person had a son and two daughters. The son died before him. On the father's death, besides the two daughters above mentioned, he left a widow and a son's daughter, claimants of his estate. It is proved that a certain sum was settled on the widow as dower, and the question now therefore is, to what proportion of the estate she is entitled, in satisfaction of her dower and in virtue of her legal share of inheritance; and to what shares of the estate of the deceased are his daughters and son's daughter entitled?

In addition to her prior claim of dower, the widow takes a legal share.

R. If the amount specified as dower exceed the value of the estate, the heirs will not be entitled to succeed to any part of it, but the whole will appertain to the wife in virtue of her claim of dower. If the amount specified fall short of the value of the estate, the proceeds must in the first instance be applied to satisfy the claim of dower. Of the residue one-eighth* must be given to the widow as her legal share of the inheritance, and the remaining seven-eighths must be distributed equally between the two daughters.

A son's daughter cannot inherit with daughters.

A son's daughter has no right of succession while there are daughters.†

Authorities.

Authorities: In the *Hidaya*, on the chapter treating of privileged slaves—"In the case of property appertaining to an insolvent estate, the right of the heirs is defeated." So also in the *Dar*, a commentary on the *Ghoorur*—"No right of property remains to the heirs in the case of an estate, the assets of which are not more than sufficient to answer the demands against it. So also in the *Shareefeeah*, a commentary on the

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* See Prin. Inh. 14. † 19.

Sirajjyah—"Next the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid, and lastly, the distribution of the residue among his successors."

These quotations are sufficient to show that the liquidation of the debts precedes the distribution of the property among the heirs. In the *Shareefeeah*, also treating of widows, it is stated that one-eighth belongs to them with children, and treating of daughters, that two-thirds belong to two or more, and treating of son's daughters, that they cannot inherit where there are sons or daughters of the deceased, and that any surplus after the distribution reverts to such sharers as are entitled thereto.

CASE XVII.

Q. A person having built a dwelling house, made a present of it to his daughter at the time of her marriage. The husband to whom she was united had some children by her, and had also some children by slave girls. Both the husband and wife are now dead. Does the house belong of right to the children of the wife alone, or are the children of the husband by the slaves entitled to succeed as heirs also?

The wife's children will succeed to her estate, exclusively, if she survive her husband; but if the husband survive her, his heirs will share in one-fourth.

R. If the husband died before his wife, his children by the slave girls have no right to the house. According to Law the children of the wife will inherit all the property both real and personal left by their mother. If the wife died before her husband, he was entitled to one-fourth of her property both real and personal, and his legal share of it, according to Law, must be distributed among his children, whether by the wife or slave girls, in the proportion of two shares for a son and one for a daughter.

CASE XVIII.

Q. A person made over to his wife, by a deed of *Beea Mokasa*,* all his property in satisfaction of part of her dower. The wife remained in possession of the property so transferred during her lifetime, and died, childless, before her husband; a short time afterwards her husband also died, leaving by another wife a son and daughter, who lay claim to the property left by him. But the two nephews (one of whom is now represented by his son) of the deceased wife claim the entire property in virtue of the deed of *Beea Mokasa** by which it was conveyed to her in satisfaction of dower. In this case to whom will the litigated property of right belong?

The heirs of both husband and wife will succeed equally to her estate, she dying childless and before her husband.

R. Under these circumstances, half the estate left by his wife legally devolved on her husband in right of inheritance. On his death that half will go to his children by another wife. The remaining half will be divided equally between the two nephews of the deceased wife, and after the death of one of them, his entire share will devolve on his son.†

CASE XIX.

Q. A woman marries a second husband during the lifetime of her first, and continues to cohabit with such second husband for the period of twenty-nine years, during which time she had by him several children.

* The strict meaning of the term "*Mokasa*" is "Retaliare et coæquare rationes"—*Meninski*—but in the language of the Law, when connected with the term *Beea*, or sale, it means a sale of property for property, or barter, which is sale in one shape, and purchase in another.—Hidaya.

† The reason of this is that although (the husband having made over all his property to his wife in satisfaction of dower) his heirs could not possibly have had any claim to succeed to the property on the wife's death, had she survived her husband, yet she having died, childless, before her husband, he, as heir, was entitled to one moiety of the property left by her as his legal share, and consequently no distribution of the property having taken place during his lifetime, his heirs were after his death entitled to the same proportion.

Will she, in virtue of such marriage, be entitled to inherit the property of her second husband on his death; and supposing a man to die, leaving a widow, three sons, a daughter and a brother, claimants to his property, to what proportions of it will each of them be entitled; and if the deceased, during his last sickness, had declared his intention that the persons claiming to be his widow and his children should take all his property, will such disposition hold good; and in what proportions will they share?

Of a woman marrying again during the life of her first husband.

R. So long as the first marriage shall continue undissolved by divorce or otherwise, the marriage of a woman to a second husband is wholly illegal; and if cohabitation be the consequence of such second marriage, it amounts to adultery, and the issue of such intercourse are bastards, who, with their mother, are wholly incompetent to inherit the estate of their deceased father. If the second question relate to the parties mentioned above, neither the person claiming to be his widow nor her children are entitled to any proportions of the property, and the whole will go to the brother by right of consanguinity; but the verbal disposition made by the deceased during his last sickness will hold good to the extent of a third of his property, of which the person claiming to be his widow and her sons will take shares alike. If the question relate generally to cases of persons having a legal claim to inheritance, the answer is, that the share of the widow is one-eighth, and the remainder should be distributed, to the exclusion of the brother, among the sons and daughters, in the proportion of a double share to the male.

Of the children by such second marriage.

CASE XX.

Q. A person died seized of a landed estate which he inherited from his father. He had three wives. The

first wife died during his lifetime, leaving one son. By his second and third wives, who survived him, he had two sons and two daughters, all living; besides which persons he left a sister, so that there are altogether eight claimants to his estate. His sons took possession of the entire property without allotting any portions to his widows or daughters. Subsequently to his death his sister (and on her decease her heirs) and the daughter of his third wife lay claim to shares of the property. The sons in possession plead that it has been the immemorial usage of their family to exclude females from the inheritance, to which the claimants reply by denying the usage and alleging that they had already partially obtained their right of inheritance in money and lands. Under these circumstances, are the parties claiming entitled to succeed to any portion of the estate left by the deceased,—and if so, what is the extent of their respective shares?

Sisters are excluded by sons and daughters.

R. Possession is of various kinds. It is not expressly stated on what tenure and for what period the deceased and his father held the property, nor is the original acquirer mentioned, nor the mode by which the acquisition was made; neither is it distinctly stated that besides the persons enumerated there were no other claimants of the estate at the death of the proprietor; which not being satisfactorily ascertained it is impossible to declare into how many shares the property should legally be distributed: but it is concluded that the object is to ascertain the legal shares of those specified on the supposition that there were no other persons entitled to participate. On this presumption therefore it may be stated that, according to the Law of Inheritance, a sister and her heirs are excluded from the inheritance by sons and daughters of the deceased. An eighth therefore should be given to the widows,

two shares to each of the sons, and one share to each of the daughters, supposing that none of these claimants had compromised or surrendered their rights, and that all claims requiring previous satisfaction had been adjusted; as is laid down in the *Shareefeeah,* a treatise on inheritance,—"Brothers and sisters by the same father and mother and by the same father only are all excluded by the son and the son's son in how low a degree soever." "Wives take in two cases: a fourth goes to one or more on failure of children, and son's children, how low soever, and an eighth with children or son's children in any degree of descent." "If there be brothers and sisters by the same father and mother, the male has the portion of two females."

Authority for their exclusion.

For the share of the widow.

For the male's double share.

CASE XXI.

Q. Has a woman any right to share in the property left by her deceased step-son?

R. A step-mother is not considered in law a mother. She is called wife of the father. She only who bears the child is termed mother. As a step mother is not viewed in the same light as a mother, she cannot take the maternal share of inheritance, which is a right appertaining to mothers alone.

Of a step-mother.

CASE XXII.

Q. On the death of a widow in whose favour an assignment of property had been made by her husband in lieu of her dower, she leaving a son, a daughter, and a daughter by a second wife of her husband, which of these persons will succeed to her property?

R. Her son will take two parts and her daughter one. The daughter by the second wife of her husband has no title to any share.

Of a step daughter.

CASE XXIII.

Q. A person having received a gift of certain landed property dies, leaving his father's mother, his mother, and his paternal half uncle; which of these persons will be entitled to inherit his estate, and in what proportions; and supposing he left another paternal half uncle, how will his property be distributed among the four persons above enumerated?

Of a grandmother with a mother.

R. If a person die, leaving his grandmother, his mother, and only one paternal half uncle, the property will be made into three parts: one of which will go to his mother and two to his paternal half uncle; and if he left two paternal half uncles, they will each take one share, the remaining third going to his mother.*

CASE XXIV.

Q. Admitting the relation of the parties to the deceased proprietor to be as stated, how much of his property will go to his mother, and how much to the plaintiffs—his brother's sons?

Of a mother with brother's sons.

R. One-third will go to his mother, and two-thirds to the plaintiffs, by reason of their male consanguinity and residuary title.†

CASE XXV.

Q. 1. A woman (A) had three daughters: B, C and D. The last mentioned (D) died before her mother, leaving children. On the death of A, her two surviving daughters (B and C) take possession of her property; afterwards B died. Under these circumstances, how will

* The grandmother is in this case excluded agreeably to Prin. Inh. 37.

† It is presumed in this case that there were no sons, nor sons' children, nor brothers, nor sisters, in which case, according to Prin. Inh. 34, the mother is entitled to one-third.

the property of B be divided between her sister (C) and her late sister's (D's) children, being a son E and a daughter F?

R. 1. Under the circumstances stated, the property, according to the Moohummudan Law, will be vested in C alone, because D died before her mother and B died after the decease of her mother, leaving a sister (C). According to Law, E and F are not entitled to inherit, as C is the legal heir, or the only person for whom the Law prescribes a legal share, and E and F are merely distant kindred, for whom no provision is made under such circumstances, and who, while a legal sharer is living, can have no right of inheritance, as is laid down in the *Shurhi-oo-Tahavi*,—"The distant kindred cannot inherit while a legal sharer survives." Of a sister with the children of her deceased sister.

Q. 2. By reason of the death of D before her mother, are her children excluded from inheriting their maternal grandmother's estate or not? If they are not excluded from the inheritance, in what proportions will they share her property?

R. 2. The death of D before her mother causes her children to be excluded from inheriting their maternal grandmother's estate, because B (the daughter of A) is a legal sharer, and E and F are distant kindred, and, according to the doctrine already cited, distant kindred are excluded from inheritance where there is a legal sharer.* Of a daughter with the children of a deceased daughter.

CASE XXVI.

Q. Zuhooroonissa, a female Moosulmaun, dies, leaving as claimants to her property two half-brothers and a half-sister, by the same father only, and a son and a widow and two

* Prin. Inh. 9.

daughters of her uterine brother, who died before her. Pending the suit, the widow of her uterine brother dies. Under these circumstances, to which of the relatives above specified will the property of Zuhooroonissa legally go, and in what proportions?

Of half brothers and half sisters, with sons & daughters of a whole brother.

R. Under the circumstances stated, the whole of the property left by Zuhooroonissa will go to her half-brothers and her half-sister. The property will be divided into five shares: of which each half-brother will take two and the half-sister one. The son, the widow and the two daughters of her uterine brother, cannot succeed to any part of the property, because the brother's widow has not any right of succession, and because there being half-brothers and a half-sister, the son and daughters of the uterine brother are excluded from the succession, as is declared in the Law of Inheritance.*

Q. A, the original proprietor of a landed estate, has a son, B, and a daughter, C. B dies during the lifetime of A, leaving a son, D. Afterwards A dies, leaving C and D. Previously to the distribution C dies, leaving two daughters, E and F. Under these circumstances, to what shares of the property left by A and C are their representatives E and F and D respectively entitled?

Of a son's son (the son having died dur-

R. The fact of D's father (B) having died during the lifetime of his grand-father A, operates to his imperfect

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* There is a distinction made between brethren by the same father only and brethren by the same mother only See Prin. Inh. 26 and 30, the latter being sharers and taking a portion at all events (unless there be children or son's children how low soever, or a father or paternal grand-father how high soever) and the former being only residuaries; but both classes exclude the children of brethren, even though they be by the same father and mother.

exclusion.* Had such not been the case, D would have been entitled to two out of the three shares, only one-third going to the daughter C. Under the circumstances stated, one-half is the property of C, and the other half devolves upon D. On the death of C, leaving two daughters, E and F and her nephew D, the half of the property which she inherited must be divided into three parts, two of which belong to E and F, and one to D, so that by this means D (or his representatives) is eventually entitled to two-thirds of the entire property left by his grand-father A, and E and F (or their representatives), the grand-daughters in the female line of A, are entitled to one-third only of his estate. ing the lifetime of the father: and two daughters of a daughter.

CASE XXVIII.

Q. A person, named Sheikh Ahmud, lays claim to all the property, real and personal, of a deceased woman, named Motee Jaun, also to recover a debt due to the deceased by two individuals; on the plea, that his grand-father had made a conditional grant of a portion of land to the said deceased, stipulating that she was to enjoy the profits thereof during her lifetime, but that after her death it was to revert to the donor; and that she, during her lifetime and a short time before her death, executed a deed of gift in favor of him, the claimant making over to him, at her death, the said land, together

* In this case there seems to be an inaccuracy in the Futwa in the use of the term *hujb noosan* or imperfect exclusion, which signifies an exclusion from one share and an admission to another, and it takes place in respect to five persons only; the husband or wife, the mother, the son's daughter and the sister by the same father. Thus, for instance, the share of the wife is one-fourth when there are no children, but if there are children she is excluded from the fourth share, and is admitted to an eighth share only. But the son or son's son (the son having died during the lifetime of the father) is perfectly excluded from any *share* of the inheritance technically so called. He comes in merely as a residuary in his own right. The share of the one daughter, C, is half by law, and he takes the other half as residuary. At the second distribution the share of the two daughters, E and F is two-thirds and he takes the remaining third as residuary.

with all her property, real and personal; and assigning to him the amount of the debt due to her, (being ninety-four rupees thirteen annas,) from the individuals above alluded to. Four other persons also lay claim to the property, namely, Munna Khan, Mean Khan, Jeevun Khan, and Chand Khan; the two former on the plea, that the deceased was daughter of the paternal aunt and daughter of the maternal uncle of them respectively; and the two latter, that she was the wife of the brother of their grand-father. Sheikh Ahmud and Mean Khan have each adduced satisfactory evidence in support of their respective allegations. Under these circumstances, which of the claimants is entitled to succeed to the property left by the deceased woman?

Of the grandsons of a husband's brother.

R. Neither Sheikh Ahmud, nor Jeevun Khan, nor Chand Khan, have any claim of inheritance to the property of the deceased. But the witnesses have satisfactorily established the allegation of Sheikh Ahmud, respecting the gift, which is virtually a bequest, because it appears from the testimony adduced, that the gift was made in the last sickness of the deceased, and every donation made on a death-bed is a bequest;

Of a death-bed gift.

according to the *Shurhi Viqaya,*—"A death-bed gift, though actually made, must be deferred until death, because its conditions are dependant on that event; for if the property be insufficient to cover all the debts, the gift will be null, and if there be no debt, it will be good only as far as a third of the estate." Also according to the *Madun,* —"When a person on a death-bed makes a gift, it must be taken out of a third of his estate." Therefore after defraying the funeral expenses, and liquidating the debts of the deceased, a third of what remains must be given to Sheikh Ahmud, in virtue of the bequest. According to the *Sirajyyah,*—"There belong to the property of a

person deceased four successive duties: first his funeral ceremony and burial without superfluity of expense, yet without deficiency; next the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors, according to the divine book, to the traditions, and to the assent of the learned. They begin with the persons entitled to shares, who are such as have each a specific share allotted to them in the book of Almighty God; then they proceed to the residuary heirs by relation, and they are all such as take what remains of the inheritance, after those who are entitled to shares, and if there be only residuaries, they take the whole property; next to residuaries, for special cause, as the master of an enfranchised slave, and his male residuary heirs; then they return to those entitled to shares according to their respective rights of consanguinity, then to the more distant kindred." Now Munna Khan and Mean Khan are among the distant kindred; and in the event of there being no residuaries, or legal sharers, the distant kindred inherit; and in that case, the two individuals aforesaid will succeed to the two-thirds of the property which remain after defraying the funeral expenses, the discharge of the debts, and the payment of the legacies out of the third, according to the authority above quoted.*

CASE XXIX.

Q. A woman (A) after the death of her husband (B) takes possession of his property which he inherited from

* Here the son of the father's sister and the son of the mother's brother will both inherit; the former taking by reason of his paternal connexion two-thirds, and the latter one-third by reason of his maternal connexion. Where claimants of the same degree belong to different sides of the family, one does not exclude the other; but had the claimants been the son of a father's brother, and the son of a father's sister, the latter would have been excluded.—See Prin. Inh. 53.

his grand-father, and continues seized of the same during her lifetime; but under what title she held is not clearly ascertained. Under these circumstances, there being two claimants, A's half-brother, and the grand-son of B's half-sister by the same father only, on which of the two will the property devolve? If it should devolve on both, in what proportions will they share?

Case of a grandson of a half sister by the same father only, and a widow's half brother.

R. It appears that the property in this case was ancestral, but it is not clear under what title A came into possession. From the fact of its having been ancestral, it follows that it belonged to B, and after his death it should devolve on his heirs. The seizin of A is of no effect to prove her proprietary right. According to the question it appears there are no other heirs of B than his widow and a half-sister's grandson; but the widow (A) as well as being one of the heirs, is a creditor of her husband also; for, according to the Moohummudan Law, dower is a necessary debt in case of a marriage, insomuch that there can be no contract of marriage without dower. If B, the husband, during his lifetime satisfied the debt of his wife's dower, or she voluntarily relinquished her claim to it, notwithstanding the possession of A, the property will be made into four shares, of which the widow (A) will take one as her legal share, and after her death the same share will go to her half-brother, and the remaining three shares will go to B's half-sister's grand-son. If B died without satisfying the claim of his wife's dower, and she did not relinquish it, the debt due on account of her dower should be paid to A's heir, being her half-brother, before the distribution of the estate to satisfy the claims of inheritance. After satisfying the debt of dower, if there remain any surplus, it will be made into four parts and be distributed among the parties in the proportions already specified.

If it had been proved that A was seized of her husband's property in virtue of proprietary right, as for instance in exchange of her dower, in this case the whole property would have devolved on her half-brother as her legal heir, and B's half-sister's grand son would have been excluded from the inheritance. According to the question however it does not appear to have been proved that the possession of A was of this nature; but it has been proved that the property formed the ancestral estate of B. The proper answer to the question therefore is as originally stated. By the term ancestral estate is meant property which, having belonged to his grand-father, devolved on the husband in right of inheritance. It is declared in the *Hidaya*,—"It is a rule, that if an inheritee's right of property in any thing be proved, still a decree cannot pass in favour of the heirs, until proof be adduced of the death of the inheritee, and of their right of heritage.'' So that in this case the proof that the property belonged to the grand-father and that he left it as an heritable estate, is proof that it belonged to him of right after the death of his grand-father. In the *Hidaya* also "The payment of dower is enjoined by the Law." So also in the *Sirajya*,—"Next, the discharge of his just debts from the whole of his remaining effects; then, the payment of his legacies out of a third of what remains after his debts are paid; and lastly, the distribution of the residue among his successors." "Then the offspring of his father or his brothers." "Then the strength of consanguinity prevails: thus a brother by the same father and mother is preferred to a brother by the same father only, and a sister by the same father and mother, if she become a residuary with the daughter, is preferred to a brother by the father only; then to the more distant kindred. The third sort are descended from the parents of the deceased; and they are the sister's children and the brother's daughters."

CASE XXX.

Q. In the event of the deed of dower set up by a widow proving to be invalid, will her adversary, who is brother of her husband, succeed, according to the tenets either of the *Soonnee* or *Sheea* sects, to the property left by him? and how will his property be distributed among the heirs according to both doctrines?

Right of a brother, according to the *Soonnee* doctrine.

R. According to the tenets of the *Soonnee* sect, the brother of the deceased will be entitled to a share of the property by right of inheritance, as residuary, after the legal sharers shall have been satisfied. Two tables are subjoined, exhibiting the mode in which the property will be distributed according to the respective allegation of each party. According to the tenets of the *Sheea* sect, the brother has no right of inheritance while there is a daughter. The widow and her daughter will succeed jointly, and on this supposition there is no necessity for defining the shares of inheritance.*

And according to the *Sheea* doctrine.

CASE XXXI.

Q. A person dies, leaving an only daughter and the son of a half-brother by the same father only. Has the latter person any legal claim of inheritance to the property of the deceased?

Of a daughter with a half brother.

R. It appears that the person alluded to in the above question died leaving a daughter and a half-brother who are the sole claimants. Under these circumstances, his estate will be made into four parts, of which the daugh-

* By the tabular sketch of the family delivered in by the widow, the husband's brother became entitled to thirty-eight out of two hundred and sixteen shares of the property left by him, or between a fifth and sixth of the estate. According to the calculation made in conformity to the sketch delivered in by the husband's brother, he was declared entitled to one hundred and forty-six out of six hundred and forty eight, or between a fourth and fifth of the estate.
Vide App. Tit. Inh. 7, 8, 40.

ter will take two parts, or half, as her legal share, and the other half will go to the half-brother, as residuary, on whose death his son will succeed to it.*

CASE XXXII.

Q. A Moosulmaun gave his daughter in marriage to another, and, on the occasion of the marriage ceremony, bestowed upon her jewels and a variety of other valuables. The husband also gave her some jewels after marriage. The wife died having given birth to a son, since deceased. The father of the wife now claims all the jewels and valuables given to her, as well by himself as by her husband. Is he entitled to the whole of such property, or to any proportion; and if not, to whom do they legally belong?

R. After defraying the expenses connected with the funeral ceremony and other acts which must necessarily be performed for the deceased, her whole estate (whether obtained by her on the occasion of her marriage or otherwise) should be made into twelve parts, of which the father is entitled to two and the remaining ten belong of right to her husband.† Of the paraphernalia of a deceased woman.

CASE XXXIII.

Q. A person dies, leaving a brother, two paternal half grand-uncles, and two daughters of a paternal grand-uncle,

* According to Prin. 16, the daughter takes a moiety, and there being only one residuary heir, who takes the other moiety without a fraction, this case affords an example of the First Principle of Distribution (75).

† The husband obtains so large a portion chiefly in right of his son to whom he is sole heir. On the death of the woman, her property should have been made into twelve parts agreeably to Prin. 65—the father being entitled (see Prin. 32) to one-sixth, and the husband (See 15) to one-fourth—and, as they, take their shares (two and three parts of twelve) without a fraction, leaving the remaining seven to be taken by the son as sole residuary heir, this case affords an example of the First Principle of Distribution. (75).

who claim his estate. In this case which of the claimants are entitled to succeed according to the Law of Inheritance?

Of distant kindred with legal sharers or residuaries.

R. The mother is a legal sharer and the paternal half grand-uncles are residuaries, and are therefore the heirs of the deceased. The daughters of the paternal grand-uncle are among the distant kindred,* which persons can never take any part of the property so long as a legal sharer or a residuary remains.†

CASE XXXIV.

Q. A woman dies, leaving certain property which she had obtained from her husband in satisfaction of dower. The claimants to her estate are two sisters and the daughter of a son, which son died during her lifetime. To what proportions of such property are these persons respectively entitled?

Of two sisters with a son's daughter.

R. The property left by the deceased woman, whether obtained in satisfaction of dower, or in whatever manner acquired, should be divided into four parts, of which the daughter of her son is entitled to a moiety,‡ or eight annas in the rupee, and the sisters will take the remaining moiety; that is, a quarter, or four each.¶

CASE XXXV.

Q. A woman dies, leaving as her heirs a husband, a daughter and a paternal uncle. In what proportions will those claimants severally succeed to the estate left by her?

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* See Prin. Inh. 47.

† The mother's share in this case would be a third: see Prin. 34. The remaining two-thirds would go to the grand-uncles as residuaries, and the estate would be divided into three parts without a fraction, furnishing an example of the First Principle of Distribution. (75).

‡ See Prin. Inh. 18. § 25. ¶ First Prin. of Dist. (75).

R. The share of the deceased will be made into four parts, of which her husband is entitled to one, or a fourth, as his legal share, the daughter to two, or a moiety, as her legal share, and the paternal uncle to the remaining one, as residuary.* Of a daughter with a husband and a paternal uncle.

CASE XXXVI.

Q. Mussummaut Shahamut dies, leaving a daughter (Mussummaut Zainub) who, subsequently to the death of her mother, succeeds to her whole estate. Afterwards, the daughter dying childless, does the whole or a portion of the property which she inherited from her mother vest in her maternal uncle, or does it all appertain to her husband? If they both inherit, how will the property be divided between them?

R. Under the circumstances of the case in question, it appears that Mussummaut Shahamut died leaving a brother, as well as a daughter. Her daughter in this case was entitled to one moiety only of the property; the other moiety belonging of right to the deceased's brother, he being a residuary heir. On the death of the daughter, leaving no issue, her share will be made into two parts, of which one will go to her husband, as his legal share, and the remaining moiety (if there be no other sharers nor residuaries) to her maternal uncle, who is enumerated among the fourth class of the distant kindred.† Of a husband with a maternal uncle.

CASE XXXVII.

Q. A person dies, leaving a widow, a son of his paternal uncle, two sons of his sister, three daughters of his sister, and six grand-sons of his paternal uncle.

* First Prin. of Dist. (75.)
† First Prin. of Dist. 75 and Prin. Inh. 46.

Which of these persons will succeed to his property, and in what proportions?

Of a paternal uncle's son with a widow.

R. After defraying the funeral expenses of the deceased, the liquidation of his just debts, and the payment of legacies left by him, to the extent of a third of the property, the estate will be made into four parts, of which the widow will take one part, as her legal share,* and the remainder will go to the son of the paternal uncle as residuary. The grand-sons of the paternal uncle will be excluded by reason of the intervention of their father and the others rank among the distant kindred only.† Therefore, under these circumstances, they take no share of the inheritance.‡

Sister's sons are distant kindred.

CASE XXXVIII.

Q. A woman leaves as heirs her brother and sister. In what proportion will her estate be divided between those individuals at her death?

Of a brother with a sister.

R. It will be made into three shares, of which two will go to the brother and one to the sister.§

CASE XXXIX.

Q. A person dies, leaving as his heirs a widow and a brother. How will his property be distributed between them; and what shares will each of them receive?

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* See Prin. Inh. 14. † 45.

‡ This also is an example of the First Principle of Distribution (75). Where there are no children, the share of the widow is one-fourth. The property must consequently be made into four parts, of which the widow takes one as her legal share, and the remainder goes to the son of the paternal uncle without a fraction.

§ Prin. Inh. 22. First Prin. of Dist. (75)

R. It will be made into four parts, of which the widow will take one as her legal share, and the brother the remaining three as residuary.* Of a brother with a widow.

CASE XL.

Q. A and B, two brothers, inherited equally their patrimonial property. The former died, leaving a son C, who next died, leaving a son D. B then died, leaving a widow and four daughters. The widow also is since dead. Under these circumstances, how is the property of the two brothers to be distributed among their surviving heirs?

R. It appears from the proceedings that A died before B, and that B died before D. In this case all the property of A will on his death go to his son C, and on his death to his son D. Of the property left by B, an eighth will go to his widow and two-thirds to his daughters as their legal shares. D will be entitled to the rest as residuary. Thus B's property will be made into twenty-four parts,† of which the widow will be entitled to one-eighth or three parts, the daughters to two-thirds or sixteen, and the brother's son or grand-son to the remaining five parts. The widow having died before the distribution, her share will be taken by her daughters. Of a widow with four daughters and a brother's son.

* *First* Principle of Distribution (75), where the parties receive their shares *without* a fraction. A fourth (agreeably to Prin. Inh. 14) being the share of a widow, when there are no children, the property must be made into four parts, of which she takes one, and the residuary heir the remainder.

† When the portion of one set of sharers is one-eighth, and that of another set of sharers two-thirds (as in this case), or one-third, or one-sixth, the rule is that the estate must be made into twenty-four parts (66). This is an example of the First Principle of Distribution, all the heirs getting their portions without a fraction (75).

CASE XLI.

Q. A woman dies, leaving a husband, an infant son, a mother, and a sister. In the presence of all these claimants, the mother of the deceased woman brings an action against her son-in-law to recover from him her maternal share of the dower to which her daughter was entitled. Under these circumstances, has she a right to recover any thing on account of dower from the husband of the deceased woman; and if so, to what proportion of the dower so due is she entitled, and to what shares will the other claimants be respectively entitled to succeed?

Of a son with a mother and husband.

R. The mother of the deceased woman has a good right of action against the husband for her maternal share of the dower due to her daughter, and the entire sum due on that account should be distributed into twelve portions, of which three shares (a fourth)* belong to the husband, two (a sixth)† to the mother, and seven to the infant son; but the sister‡ is not entitled to any thing, she being excluded by the son.§

CASE XLII.

Q. A person died leaving two wives. By the first wife he had one son, and by the second two sons. The son by the first wife died, leaving a wife and two sons. Supposing the deceased son above-mentioned to have assigned over all his property in dower to his wife, has the brother of that wife, on the death of herself and of her two sons, a right to inherit the property which had been so settled upon her in satisfaction of dower, or is he entitled to any share

* See Principle 15. † 33. ‡ 21.

§ First Principle of Distribution (75). Where a fourth and a sixth share occur together (see Principle (65), the division must be by twelve, and this arrangement suiting to satisfy all the legal claimants, there is no occasion for any further process.

of it? And supposing the deceased son above-mentioned not to have assigned his property in dower, but that his widow was in possession of her husband's legal share, has her brother a right to any share of it, on her death?

R. If a person, having assigned over all his property to his wife in satisfaction of dower, die, leaving her and two sons, and the sons die before their mother, and she die, leaving a brother, that brother will be legally entitled to all the property left by her. But if she die before her sons, or before one of her sons, and those sons die, leaving their paternal half-uncle, or his sons, and their maternal uncle, under these circumstances the paternal half-uncle or his sons will be entitled to the property left by them by reason of their right as residuaries, and the maternal uncle, who is among the distant kindred, will not be entitled to any thing. Supposing the deceased not to have assigned to his wife his property in dower, but that she was in possession of an eighth share thereof, which was her legal right (the remainder belonging to her sons), and that she die before her sons, then her eighth share will devolve upon them, and on their death will go to their paternal half-uncle or his sons. The maternal uncle will not be entitled to any part of it. If one of the sons die, leaving his mother and his brother,* his property will be made into three shares, of which his mother will get one, and his remaining brother two; and if the other son die, leaving his mother, his paternal half-uncle, or sons of that uncle, his property will be made into three shares, of

Of a paternal half uncle, with a maternal uncle.

Of a brother with a mother.

Of a mother with a paternal half-uncle.

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* The Law Officer attached to the Zillah Court of Hoogly declared in his Futwa that the property should, in this case of a mother and a brother, be divided into six parts, the mother in such case being entitled to one-sixth only; but this opinion is manifestly erroneous. If indeed there had been more than one brother, the mother would have been entitled to a sixth only. See Principles 33 and 34. This is an example of the First Principle of Distribution (75), there being no fraction.

which one will go to the mother, and the other two to the paternal half-uncle or his sons, in virtue of their residuary claim. If, after that, the mother die, leaving only her brother, her whole property will devolve upon him. The succession of these persons severally to the vested interests cannot be stated, it not having been ascertained which of them survived longest.

CASE XLIII.

Q. A proprietor of land being in joint possession thereof with the son of his daughter, obtains a formal grant of the property in the name of himself and his said grand-son. Afterwards his daughter dies, leaving a son (the grand-son of the proprietor above alluded to), a daughter, a husband of that daughter, and her own husband. Some time subsequently to this event, the proprietor of the land dies, and for a long lapse of time no tidings have been heard of his grand-son, who had travelled to a distant country. The grand-daughter of the proprietor next dies, leaving a son, a daughter, and a husband. After her the son-in-law of the proprietor dies, leaving a son by a second wife. Under these circumstances, of the persons enumerated, that is to say, the husband, the son, and the daughter of the grand-daughter, and the son of the son-in-law (who is half-brother of the proprietor's grand-son), which of the persons will be legally entitled to the land left by the proprietor, and in what shares?

Of a daughter's son and daughter's daughter.

R. Under these circumstances, the right and title to the land will be solely vested in the original proprietor, notwithstanding he may have obtained the formal grant in the joint names of himself and grand-son; because the law pays respect to persons and not to names. If his daughter die before him, she will be excluded from all participation in the property. If the proprietor die,

leaving a daughter's son, a daughter's daughter, a daughter's husband, and the husband of a daughter's daughter, in that case the property will be divided into three shares, of which his grand-son will obtain two shares, and his grand-daughter one. The husbands of the daughter and of the daughter's daughter are not entitled to any share. An absentee, concerning whose place of abode, death, or existence, no tidings can be learnt, is, as regards his own property, alive, and as regards that of others, defunct. The ruling power should appoint some one to take charge of his affairs, and his portion should be reserved for the period* of ninety years. Any of his relations who die in this interim will not participate in his property. Supposing the grand-daughter to die, leaving a son, a daughter and a husband, her property will be made into four parts, and distributed among her heirs in the following manner : One share will go to her husband, two to her son, and one to her daughter ; and if the original proprietor's son-in-law died, possessing property distinct from that of such proprietor, it will devolve on his son.†

Of a son with a husband and a daughter.

PROPOSITUS.

A

Deceased, $\frac{12}{3}$.

D	C	B
C's husband.	Daughter's daughter, $\frac{4}{1}$ share.	Daughter's son, $\frac{8}{2}$ shares.

Sketch of the family in the above case.

C	D
Deceased, 4.	C's husband, 1 share.

E	F
C's son, 2 shares.	C's daughter, 1 share.

* This period is to be reckoned from the date of the absentee's birth.

† First Prin. of Dist. (75).

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TOTAL.

F, 1 share. E, 2 shares. D, 1 share. B, 8 shares.*

CASE XLIV.

Q. A person turned away his wife on account of her misconduct. She went to another place and maintained herself by her own exertions for a period of four years. On her death, leaving her husband and a brother's son, which of these two persons is entitled to succeed to her property according to the Law of Inheritance?

Of Separation without divorce.

R. If the person divorced himself from his wife at the time of separation, the only legal claimant to her property will be her brother's son; but if he merely turned her away without a divorce, her coverture still continues, and on her death her husband and her brother's son will succeed to her estate jointly. They will each be entitled to one moiety, the husband to half† as his legal share, and the brother's son to the other half as residuary.‡

Of a husband with a brother's son.

CASE XLV.

Q. A Moosulmaun dies, leaving a son and three daughters, who marry after his death. What will be the respective shares of these persons in the property left by the deceased?

Of a son and three daughters.

R. It will be made into five parts, of which the son will get two,§ and the daughters three, or one each.¶

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* The property of A must in the first instance be made into three parts, to be divided between his grand-children B and C, so as to give the male a share double that of the female. On C, the grand-daughter's death her property must be made into four parts—the share of her husband being one-fourth; but her one share having been multiplied by four it is necessary to multiply the other portions by the same number, thus A's portion 3 × 4=12, and B's portion 2 × 4=8.

† See Prin. Inh. 15. ‡ First Prin. of Dist. (75). § See Prin. Inh. 3.

¶ First Prin. of Dist. (75).

CASE XLVI.

Q. A woman dies, leaving some ancestral landed property. A daughter and a brother's son are her only surviving heirs. How will her estate be divided according to law between these two persons?

R. Supposing the woman to have no other heirs than those mentioned, her property will be equally divided between her daughter and her brother's son. Half will go to the daughter as her legal share,* and the other half to her brother's son as residuary.† Of a daughter with a brother's son.

CASE XLVII.

Q. The proprietor of an estate, which he acquired by his own industry, sold six shares of it during his lifetime, and left the remaining ten shares to devolve on his heirs, who in this case were a son of a paternal uncle and a sister. To what shares will these persons be entitled respectively according to the Law of Inheritance?

R. In this case the ten shares of the estate left by the deceased owner will be divided equally, the sister taking five shares and the son of the paternal uncle the same number.‡ Of a sister with a son of a paternal uncle.

CASE XLVIII.

Q. A person dies, leaving as his heirs a widow, a son, and two daughters. How will his property be distributed among them, and what shares will each of them receive?

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* See Prin. Inh. 16. † First Prin. of Dist. (75).

‡ See Prin. 23 and the First Principle of Distribution (75).

Of a son with a widow and two daughters.

R. It will be made into thirty-two shares, of which the widow will take an eighth, or four shares, the son will take fourteen, and the daughters seven each.*

CASE XLIX.

Q. A person dies, leaving two sons and a widow. How will his property be distributed among them; and what shares will each of them receive?

Of two sons with a widow.

R. It will be made into sixteen parts, of which the widow will take two, and the two sons seven parts each.†

CASE L.

Q. 1. The father of a woman, after having disposed of her in marriage, wishes her to consent to a formal renunciation of her share in his estate, on the plea of

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* This is an example of the Third Principle of Distribution (77), where the portions of one class cannot be divided without a fraction, and where there is no agreement between those portions and the persons, or, as it is technically termed, where they are *Mootubayun*, that is to say, where they have not one common measure, or terminate in an unit. Thus the widow's share being one-eighth, (Prin. Inh. 14) the property must, in the first instance, be made at least into eight shares, and after the widow has taken her eighth, there will remain seven shares. Besides the widow there are four claimants (one son counting for two daughters, his share being double). Now the agreement or disagreement of these two quantities, 4 and 7, (the sharers and the shares) is to be ascertained, which is effected by diminishing the greater by the smaller quantity on both sides until they agree in one point, which is their common measure, or until they terminate in an unit, when there is no numerical agreement, as in this case. Thus $4 = 7 - 3$ and $3 = 4 - 1$. The rule is then, that the number of persons (4) whose shares are broken, are to be multiplied into the root (8) of the case. Thus: $4 \times 8 = 32$. I have not met with any case exhibiting an example of the second Principle of Distribution, but in page 15 will be found an exemplification of the rule.

† This is a very simple example of the Third Principle of Distribution (77). There being children, the widow's share is one-eighth (Prin. Inh. 14). Making the property therefore into eight parts, the least number from which her share can be extracted, and giving her one-eighth, there remain seven to be divided between the two sons, which obviously cannot be done without leaving a fraction. But the sharers (two) multiplied by three, equal the shares (seven) minus one, which is termed *Mootubayun*, the one number being prime to the other; in which case the rule is (see Prin. of Dist. 77), that the root of the case (that is to say the number of the original division) be multiplied by the number of sharers who cannot get their shares without a fraction. Thus: $8 \times 2 = 16$.

providing for his sons. To this proposal she refuses compliance, which irritates the father to such a degree, that he repudiates her. Is this act on his part allowable?

R. 1. By the term *allowable* mentioned in the question, it is presumed that the object is to ascertain whether the repudiation on the part of the father operates as a legal impediment to the daughter's succession. But there are only four impediments to succession:—1st, the homicide of the ancestor by the heir; 2nd, difference of religion; 3rd, difference of country; 4th, slavery. Of repudiation by a father.

The repudiation on account of a private quarrel by a father, cannot legally operate to exclude from the inheritance a child born in lawful wedlock or whose parentage he had acknowledged.

Q. 2. A woman dies, leaving a husband, an infant daughter and two brothers. Under these circumstances is her husband entitled to succeed to the whole or to what portion of her property?

R. 2. Under these circumstances a fourth* of the woman's property goes to her husband, half† to her infant daughter, and the remainder to her brothers.‡ Of a daughter with a husband and two brothers.

CASE LI.

Q. The heirs of a deceased proprietor being his widow, one son and one daughter, into how many shares should his pro-

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* See Prin. Inh. 15. † 16.

‡ In this case an easy example of the Third Principle of Distribution (77) is exhibited. Where a half and a fourth occur together, the rule agreeably to Prin. Inh. 57 is that the original division must be by 4, but after the husband has taken his fourth or one, and after the daughter has taken her half or two, there remains only one for the two brothers, which cannot be divided between them without a fraction, but 1 and 2 are prime. Therefore the whole number of the original division should be multiplied by the whole number of heirs who cannot get their portions without a fraction. Thus: 4 × 2=8.

perty be distributed, and to what proportions will these persons be respectively entitled?

Of a son with a daughter and a widow.

R. The estate must be made into twenty-four shares, of which the widow will be entitled to one-eighth or three shares, the son to fourteen, to make his share double that of the daughter, who will be entitled to the remaining seven.*

CASE LII.

Q. A person dies, leaving as his heirs a widow, two sons and a daughter. How will his property be distributed among them; and what shares will each of them receive?

Of two sons with a widow and a daughter.

R. It will be made into forty shares, of which the widow will take an eighth or five shares, the sons will take fourteen each, and the daughter seven.†

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* This is an example of the Third Principle of Distribution (77). The widow's share being one-eighth, the least number of shares must have been eight; but out of eight, when the widow has taken her share (one-eighth) there will remain but seven to be divided among the remaining sharers, who must be reckoned as three (one male always counting for two females) and seven cannot be divided so as to give the son a share double that of the daughter without leaving a fraction. The proportion therefore between the surplus shares and the sharers must be sought for, which will be found to be *Mootubayun* or prime. Thus: 3 × 2=7—1, and in this case the number of sharers must be multiplied into the root of the case, (that is the original division) to give the requisite number of shares. Thus: 3 × 8=24.

† This also is an example of the Third Principle of Distribution (77). The sharers, it must be remembered, are 5, each son counting for two daughters (their shares being double). After the widow's eighth has been deducted, there will remain seven to be distributed among the five sharers, which cannot be done without a fraction. But five (the number of sharers,) equal seven, the number of shares, minus two, and again two multiplied by two equal five, minus one, which makes them *Mootubayun* or prime, when the rule is, that the number of sharers is to be multiplied into the root of the case. Thus: 5 × 8=40.

CASE LIII.

Q. A person possessing immoveable property, dies childless, leaving two widows and a brother's son. After the death of the first widow, the second, during the lifetime of the brother's son of her deceased husband, sells the immoveable property so left. Is such sale valid according to Law? Supposing it to be invalid, what are the shares respectively of the brother's son and second widow?

Of a brother's son with two widows.

R. On the death of the childless person above alluded to, his property, after defraying his necessary expenses, will be distributed among his two widows and his brother's son according to their legal shares, that is to say, the immoveable property will be made into eight shares, of which the widows will share a fourth or two, between them,* and the remaining six will go to the brother's son as residuary. The sale by the second widow, after the death of the first, is only valid for her own share, and not for the share which appertained to the first widow, nor for the six shares which are the right of the brother's son, who is proprietor of his own share. On the death of the first widow, if she had not disposed of her share by gift or sale, and if she did not leave any legal heir, her share will go to the Public Treasury.†

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* See Prin. Inh. 14.

† This is an example of the Third Principle of Distribution (77). To give the widows their fourth share to which they are entitled, the property must have been made originally into four parts. But one (the fourth part of that number) cannot be divided between the two widows without a fraction, and on a comparison of the number of the heirs so situated, and the share allowed to them, they appear to be *Mootubayun* or prime. Thus; 1=2—1—In which case the rule is, that the number of the original division must be multiplied by the number of heirs who cannot get their portions without a fraction. Thus: 4 × 2=8.

CASE LIV.

Q. A person dies, leaving two daughters, a son's son and a daughter of a son. Under these circumstances, into how many shares will his property be made? and in what proportions will the persons above specified be entitled to share respectively according to the Law of Inheritance?

Of two daughters with a son's son and a son's daughter.

R. Under these circumstances, after providing with moderation for the funeral expenses of the deceased, after the liquidation of his debts and the payment of his legacies, to the extent of a third of the estate, the remainder will be made into nine shares, of which the daughters will receive two-thirds* or three shares each, the son's son two shares, and the son's daughter one,† in virtue of their right as residuaries.

CASE LV.

Q. A person executes a document, declaring his nephew to be his representative in proprietary right. Will this document in favor of the nephew be available according to Law? If not available, and the nephew be not entitled under it to succeed to all the property left by his uncle, in what proportions will the property be distributed among the surviving claimants, being a mother, three sisters, a brother, (who is a defendant in this cause,) a widow and a father-in-law?

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* See Prin. Inh. 17.

† Third Prin. of Dist. (77). The legal shares in this case being two-thirds, the property should have been made originally into three shares, but of this number, after the daughters have taken their two-thirds or two, there remains only one to be divided among the two other claimants, who must however be counted as three (a son receiving twice as much as a daughter). But 1 (the remaining share) and 3 (the claimants) being prime, the number of the original division must be multiplied by the number of such claimants. Thus: $3 \times 3 = 9$.

R. According to the Moohummudan Law, the document in question is of no validity, and cannot be available to confer any right of succession on the nephew, because it purports to constitute him the representative in proprietary right of the framer of it, in other words, it declares him in general terms to have the right to the entire property belonging to the framer of the document after the death of the latter. Such a declaration does not fall within any description of legal obligation, and has therefore no validity as to the creation of proprietary right. The heirs of the deceased being his mother, brother, three sisters and his widow, his father-in-law is excluded from the inheritance. His property will be distributed in the following manner: after the liquidation of his just debts the residue will be made into sixty shares, of which fifteen (a fourth)* will go to his widow, ten (a sixth)† to his mother, fourteen to his brother, and the remaining twenty-one to his three sisters or seven shares each.‡ The share of his widow, after her death, will go to her father or to her other lawful heirs.§

A document executed by a proprietor declaring another entitled to his property after his death, is null and void.

Of a widow with a mother, brother and three sisters.

CASE LVI.

Q. A person possessed of landed property, which he had obtained by gift, died about eight years ago, leaving a widow, four daughters, a brother and two sisters. His brother also died, leaving four sons, and one of his sisters died, leaving a daughter. The widow disposed of part of the property by sale. Is such sale on her part legal, and are the claimants

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* See Prin. Inh. 14. † 33. ‡ 22.

§ Third Prin. of Dist. (77). Where an eighth and a sixth occur together, the division (see Prin. Inh. 65) must, originally, be into twelve, of which when the widow has taken her fourth share or three, and the mother her sixth share or two, there remain but seven to be divided among the other claimants, who must be counted as five. But five and seven are prime. Therefore the number of the original division must be multiplied by the number of claimants who cannot get their portions without a fraction. Thus: 12 × 5=60.

who are the representatives of the deceased's brother and sister, entitled to any shares; and if so, to what shares in right of the persons whom they represent?

Case of sale by a widow of her husband's property, to which there are other legal claimants.

R. It appears that the widow has been in possession of her husband's property from the time of his death, and has disposed of a part of it by sale. The claimants come forward, urging their right of inheritance to the estate of the deceased proprietor, and they admit that the person in possession is his lawful widow. Now according to the usage of this part of the Country (Burdwan) the dower is never fixed at an amount falling short of six hundred and fifty rupees, and from the smallness of the estate it is incredible that this sum should have been realized therefrom. The claim of inheritance cannot be maintained until the debt due on account of dower shall have been liquidated. Supposing this to have been done, the estate should have been distributed among the immediate heirs of the original proprietor in the following manner: It should be made into ninety-six parts, of which the widow should receive an eighth* part or twelve shares, the daughters two-thirds† or sixty-four shares, the brother ten shares, and each of the sisters five‡ shares. Their representatives would take the same. Regarding the sale of the widow, it may be observed that she is a sharer by Law as well as a creditor of the estate, and therefore should the purchaser agree to the arrangement, the sale may be upheld as valid, so far as respects that part of the property which belongs to her in right of inheritance.§

Of four daughters with a brother, two sisters, and a widow.

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* See Prin. Inh. 14. † 17. ‡ 22.

§ Third Prin. of Dist. (77). The shares in this case being an eighth and two-thirds, the original division must, agreeably to Prin. Inh. 66, be into twenty-four, of which when the widow has taken her eighth or three, there remain twenty-one to be distributed among the four daughters, which obviously cannot be done without a fraction; but on a comparison of the number of the heirs so

CASE LVII.

Q. It appears that the proprietor of an estate, the succession to which is now disputed, had four sons and two daughters. One of the sons died during his father's lifetime, leaving a son. On the death of the proprietor, leaving a widow, three sons, two daughters and the grand-son above-mentioned, to what proportions of his estate will the survivors be entitled?

R. The estate will be made into sixty-four parts, of which each son will take fourteen, each daughter seven* and the widow (an eighth)† eight parts. The grand-son, whose father, died during the lifetime of his grand-father will be excluded from all participation in the inheritance.‡ Of three sons with two daughters and a widow.

CASE LVIII.

Q. The heirs of a deceased proprietor being his widow, his mother and his two sons, to what proportions of his estate are the individuals enumerated respectively entitled?

R. In this case, agreeably to the Law of Inheritance, the property should be made into forty-eight parts of which the Of two sons with a mother and a widow.

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situated and the shares allowed to them, they appear to be *Mootubayun* or prime. Thus: 4 × 5=21—1; in which case the rule is that the number of the original division be multiplied by the number of heirs who cannot get their portions without a fraction. Thus: 24 × 4=96.

* See Prin. Inh. 3. † 14.

‡ Third Prin. of Dist. (77). The property must in the first instance have been made into eight parts, to give the widow her share (an eighth), and, after she has taken her share, there remain only seven to be divided among the other heirs who must be counted as eight, though there are only five (one male getting the portions of two females), but these numbers (7 and 8) are prime to each other—consequently the number of the original division must be multiplied by the whole number of heirs who cannot get their portions without a fraction. Thus: 8 × 8=64.

widow is entitled to six, the mother to eight, and the sons to the remainder.*

The shares of the heirs enumerated are as follows:—

Mother	Widow	Son	Son
8.	6.	17.	17. = =48.

CASE LIX.

Q. A person dies, leaving two sons, two daughters and a widow. How should his landed property be distributed among these persons on his decease?

Claims preferable to inheritance.

R. On the death of the proprietor, his estate, whether real or personal, should in the first instance be applied to defray his funeral expenses, in the second place to the discharge of his debts, and in the third place to the payment of his legacies out of a third of the residue of the property. An eighth† goes to the widow, when there are children, and what remains after this deduction should be divided between his two sons and his two daughters in the proportion of a double‡ share to the males.§

Of a widow with two sons and two daughters.

CASE LX.

Q. Abdool Rusheed died, leaving a widow, a daughter, and the two plaintiffs, who are his paternal uncles,

* There being sons, the widow's share is an eighth, and the mother's share is a sixth; but it is a rule, that where among one set of sharers, one sharer is entitled to an eighth, and another to a sixth, or a third or two-thirds, the division must be into 24. But the eighth of 24 is 3, and the sixth is 4; consequently, after deducting 7 for the widow's and mother's shares, there remain seventeen to be divided between the two sons, which cannot be done without a fraction, in which case the proportion between the shares and the sharers is to be sought, thus: 2 × 8=17−1. The two numbers being *Mootubayun* or prime, the root of the case, or the number of the original division must be multiplied by the number of sharers, thus: 24 × 2=48. Third Prin. of Dist. (77).

† Prin. Inh. 14. ‡ 3.

§ This also is an example of the Third Principle of Distribution (77). The estate in this case should be made into forty-eight parts, of which the widow will be entitled to six, the sons to fourteen each, and the daughters to seven each.

descended from the same male ancestor as the deceased. In this case how will the property be distributed?

R. The widow will obtain an eighth; the daughter a moiety of the whole, and the remainder will be divided equally between the two plaintiffs.* Of a widow with an only daughter and two paternal uncles.

CASE LXI.

Q. A person dies, leaving a widow, four sons of his brother, an uterine-sister, and a son of his uncle. One of these persons had got possession of all the property left by him, and had remained in the exclusive enjoyment of it for about twenty-five years. In this case, according to Law, will the property be shared by all the heirs or not? If it devolves on all of them, how will it be distributed among those individuals?

R. Under the circumstances stated, if the possession were acquired without right, according to Law, such occupancy will not operate as a bar to the claims of inheritance. After providing for such expenses as are requisite before the partition of heritage, the remaining property will be made into sixteen parts, of which the sister will take eight shares, the widow four and the remaining four will devolve on his brother's sons, each taking one. The son of his uncle is excluded.† Of a sister with a widow and four brother's sons.

CASE LXII.

Q. It appears in this case, that the wife having received a deed of dower from the husband at the time of marriage, died before him, leaving two sons. Her younger son sub-

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* Thus the property will be divided into sixteen parts, of which the daughter will get eight, the widow two, and the paternal uncles three parts each. Third Prin. of Dist. (77).

† Third Prin. of Dist.

sequently died. Afterwards her husband, who had during his lifetime remained in free and absolute possession of the real and personal property now in dispute, died, leaving behind him the elder of the two sons above-mentioned, his mother, and his four slave girls, one of whom is alleged to have been married to him : he left, also, a son by one of the said slaves. Subsequently to his death his mother departed this life. The question is, at the time of the decease of the husband who were his heirs ? and how should his property be distributed according to law ? If the mother had any right to the inheritance, how is her share to be disposed of after her death ? and if the opinion to be delivered in this case should be at all affected by the fact of the validity or otherwise of the marrriage of the slave girl, let it be delivered under both suppositions, leaving that issue to be determined by evidence ?

Of a husband with children.

R. The wife in the case died leaving two sons and a husband. Her property therefore, that is the debt due to her on account of dower, must be divided into eight shares.* Her sons will take three shares each, and her husband two shares or a fourth.† Afterwards on the death of her younger son his three shares will go to her husband, who is his father,‡ so that five shares out of the eight shares, due on account of the dower, revert to the husband, and the claim against him for so much is extinct. The right to the remaining three shares belongs exclusively to the elder son. The husband dying leaves as heirs his elder son, another son (by a slave girl), his mother, and one female slave, who claims emancipation and marriage. In the event of the marriage being good and valid, the estate left by the husband will be distributed into forty-eight shares, of which the sons

Of a father with a brother.

Of two sons with a mother and widow.

* Third Principle of Distribution (77). † 15. ‡ 21.

will get seventeen each, the mother eight shares (a sixth), and the wife (that is the married female slave) six shares (an eighth). In the event of the marriage not being good and valid, the estate left by the husband will be distributed into twelve shares, of which the mother will get two* shares and the two sons five each; but as the amount of the debt, specified in the deed of dower as due to the deceased wife, is immense, and exceeds one hundred thousand gold mohurs, even after a deduction of ten-sixteenths, the claim of dower absorbs the whole estate left by the husband; and the satisfaction of such claim is preferable to that of inheritance. But the mother of the husband was entitled to an eighth of the estate in right of her husband, had a claim on the ancestral property on account of her dower, and also was in actual possession and enjoyment thereof after the death of her son. As she acknowledged the son of the slave to be her grand-son, all her right and interest in the property, real and personal, should after her death be divided into two parts, and shared equally between the two sons.

Of two sons with a mother.

Claim of dower precedes inheritance.

CASE LXIII.

Q. A man dies, leaving three widows, six sons and six daughters. How will his property be distributed amongst them?

R. It will be made into one hundred and forty-four shares, of which the widows will get an eighth† or six shares each, the sons will get fourteen shares each, and the daughters seven shares each or half‡ the amount of the sons' shares.§

Of six sons with six daughters and three widows.

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* See Prin. Inh. 33. † 14. ‡ 3.

§ This is an example of the Fifth Principle of Distribution (79), where there is a fractional division of an unit as to both sets of shares, and the number of one class of sharers equally measures the other. Thus: an eighth being the

CASE LXIV.

Q. A person dies, leaving as his heirs a father, a widow, three sons and two daughters; but another woman and her two sons claim part of the property, she alleging herself to have been the wife of the deceased, and her sons stating themselves to be his offspring. There seems however to exist considerable doubt as to whether the marriage was ever celebrated. The acknowledgment of the deceased during his lifetime, and the mode in which he took care of the claimants, form the only evidence of the truth of their allegations. Under these circumstances, can the claimants in question legally be accounted the widow and sons of the deceased? and if so, into what number of shares should the estate be divided agreeably to the Law of Inheritance?

Acknowledgment of children by their parents.

R. If the deceased during his lifetime acknowledged the parentage of those persons who now claim to be his sons; and after his death their mother make the same assertion, calling herself his widow, all these three persons will be his legal heirs. Agreeably to the *Viqaya*,—"Or if a person die, having acknowledged a

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share of the widows, the property cannot be made into less than eight shares, of which they (the widows) are to take one; but one cannot be distributed among the three widows without leaving a fraction. Besides the widows there are eighteen other claimants (supposing one son equal to two daughters, which is the mode of computation, the shares of the former being double those of the latter.) It is obvious also that the remaining seven shares cannot be distributed among eighteen persons without leaving a fraction. Between each set of shares and each class of sharers there is a fractional division of an unit which is termed *Mootubayun* or prime. Thus: the first set compared with the first class of sharers is 1 × 2=3—1, and the second set compared with the second class of sharers is 7 × 2=18—4, and 4=7—3, and 3=4—1. But one class of sharers equally measures the other without a fraction, which is termed *Mootudakhil* or concordant; three being the measure of eighteen 3 × 6=18. The rule in this case is that the greater number 18 be multiplied into the root of the case. Thus: 18 × 8=144. I have not met with any case exhibiting an example of the Fourth Principle of Distribution, but in page 16, will be found an exemplification of the rule.

certain child to be his son. If afterwards the mother declare the child to have been his son and herself to have been his wife, they both inherit." According to this supposition, after defraying the funeral expenses and satisfying the debts and legacies, the estate of the deceased should be made into two hundred and eighty-eight parts, of which forty-eight should go to the father, eighteen shares to each of the two widows, thirty-four shares to each of the five sons, and seventeen to each of the two daughters.* Of a father with two widows, five sons, and two daughters.

CASE LXV.

Q. A person dies, leaving two widows, the one married by the ceremony of *Shadee,* the other by that of *Nikah.* By the former he left three sons and five daughters, by the latter two sons and one daughter. How will his property be distributed among the persons above-mentioned, and in what proportions?

R. The property will be made into one hundred and twenty-eight parts, of which the widows will take sixteen or eight† each, the sons seventy or fourteen each, and the daughters forty-two or seven each.‡ Of five sons with six daughters and two widows.

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* Fifth Principle of Distribution (79). Here in the first place the share of the widows (see Prin. Inh. 14) is one-eighth, and of the father (see Prin. Inh. 32) one-sixth; but where an eighth and a sixth occur together (see Prin. Inh. 66) the division must be originally by twenty-four, of which, after the widows have taken their eighth or three, and the father has taken his sixth or four, there remain seventeen to be distributed among the twelve other claimants (one son counting as two daughters). But this cannot be done without a fraction, nor can three be divided between the two widows without a fraction, and two and three are prime to each other, and so are twelve and seventeen; and having ascertained this result, the whole number of one set of sharers should be compared with the whole number of the other. Thus: 2 × 6 = 12, which being concordant, the rule is that the greater number must be multiplied into the number of the original division. Thus: 24 × 12 = 288.

† Prin. Inh. 14.

‡ 3. Fifth Principle of Distribution (79). The share of the widow is one-eighth (see Prin. Inh. 14): consequently eight is the least number of shares into which the estate should originally be divided. But after the widows have taken their eighth or one, there remain seven to be distributed among the sixteen other claimants (one son counting as two daughters), but this cannot be

CASE LXVI.

Q. A person dies, leaving as his heirs four widows, eight sons and six daughters. How will his property be divided among these persons?

Of eight sons with six daughters and four widows.

R. After the satisfaction of just debts and other precedent claims, the residue of his property will be made into three hundred and fifty-two shares, of which forty-four will go to his widows or eleven shares to each, two hundred and twenty-four to his eight sons or twenty-eight shares to each, and the remaining eighty-four to his daughters or fourteen to each.*

CASE LXVII.

Q.. A man dies, leaving as his heirs two widows, a mother, a daughter, three brothers and a sister. In this case into how many shares will his property be distributed, and in what proportions will the persons above enumerated be entitled to inherit respectively?

Of a daughter with two widows, three brothers and a sister.

R. In this case the estate of the deceased will be distributed into three hundred and thirty-six shares, of

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alone without a fraction, nor can one share be divided among the widows without a fraction, and one and two are prime to each other, and so are seven and sixteen; and having ascertained this result, the whole number of one set of sharers must be compared with the whole number of the other. Thus: 2 × 8=16, which being concordant, the rule is that the greater number must be multiplied into the number of the original division. Thus: 8 × 16=128.

* This is an easy example of the Sixth Principle of Distribution (80). The share of the widows being one-eighth, the estate must in the first instance be made into at least eight shares, which number therefore is the root of the case. But the eighth of eight being one, it cannot be divided among the four widows without a fraction, and besides them there are twenty-two claimants (one male counting as two females). On a comparison of both sets of heirs with the number of their respective shares, they will be found to be prime. Thus: 1=4—3, and 3=4—1, and 7 × 3=22—1, and then the proportion between the numbers of the respective sets of heirs being found to be composit, thus: 4 × 5=22—2, the rule is that the measure of the first of the numbers (which is in this case two) be multiplied into the whole of the second, and the product into the root of the case. Thus: 2 × 22=44 × 8=352.

which the widows will take their legal share of one-eighth,* being forty-two shares or twenty-one each, the mother will take her legal share one-sixth,† being fifty-six shares, the daughter will take her legal share of one half,‡ being one hundred and sixty-eight, and the remaining seventy shares will be distributed among the brothers and sisters as residuaries, according to the known rule of a double share for the male, being twenty shares for each of the brothers and ten for the sister.§

CASE LXVIII.

Q. A person sues his father's widows, and his brother, to recover possession of half the property, real and personal, left by his deceased father. His father left two sons, a daughter and two widows. In what proportions are these persons respectively entitled to share the estate ? The widow who is the defendant in this action claims the whole of the property in satisfaction of her dower.

R. In this case the estate will be made into eighty shares, of which one-eighth¶ or ten parts will go to the widows by — *Of two sons with a daughter and two widows.*

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* See Prin. Inh. 14. † 33. ‡ 16.

§ This case affords an example of the Seventh Principle of Distribution (81). The share of the wives being one-eighth and that of the mother one-sixth, the rule is (see Prin. Inh. 66 that the estate must be in the first instance made into 24 parts, which number therefore is the root of the case. But after deducting twelve for the daughter's half, four for the mother's sixth and three for the widows' eighth, there remain five only to be distributed among the seven residuary heirs (one brother counting as two sisters), which distribution cannot take place without a fraction. Neither can three be divided between the two widows without a fraction. Consequently there is a fractional division in two sets of heirs, and the shares and the sharers are in both instances prime to each other, thus : 2=3—1, and 5=7—2, and 2 × 2=5—1—in which case the rule is to ascertain the proportion between the numbers of the respective sharers (2 × 3=7—1) which is found to be prime or divisible by an unit only, and this being ascertained, the first of the numbers must be multiplied into the second and the product into the root of the case. Thus : 2 × 7=14 × 24=336.

¶ See Prin. Inh. 14.

the rule of inheritance, that is to say, five to each widow; and, on the principle that the share of a male is double* that of a female, fourteen shares will go to the daughter and twenty-eight to each of the sons. But dower is like all other debts and should be satisfied before claims of inheritance. Therefore if the widow's claim be just, it should be satisfied before that of the heirs, and the residue afterwards should be distributed among them.†

CASE LXIX.

Q. Moohummud Tuqee, the husband of Hyatee Khanum, and grand-father of Mirza Mehdee, obtained a grant from the rulers of the country, confirming in his person the proprietary right to certain lands, which had formerly been the property of his father-in-law, Abdoo Soobhan, but which had been resumed after his death. In virtue of this grant, he became seized of the lands, and some time afterwards, having formally appropriated them to pious purposes, he executed a deed in favour of his wife, vesting in her the trust and possession of the lands so appropriated; but whether she obtained possession under that deed does not appear. After the death of Moohummud Tuqee, his son Ali Nuqee, (grand-son of Abdoo Soobhan) became seized of the lands, and after his death they came into the possession

* See Prin. Inh. 3.

† This also is an example of the Seventh Principle of Distribution (81). The share of the widows according to Prin. Inh. 14, being one-eighth, the estate should originally be made into eight parts, and after they have taken one as their eighth, there remain seven to be distributed among the five other claimants (one son counting as two daughters), which cannot be done without a fraction, neither can one share be divided between the two widows without a fraction, but one is prime to two and so is five to seven; and having ascertained this prime result, the whole of one set of sharers should be compared with the whole of the other. Thus: 2×2=5—1, which giving a prime result, the rule is that the first of the numbers be multiplied into the second and the product into the number of the original division. Thus: 2 × 5=10 ×8=80.

of his widow Koolsoom Khanum and his son Mirza Mehdee. Now Hyatee Khanum, widow of Moohummud Tuqee, sues them, to recover the property, in virtue of the deed of trust and possession executed in her favor by her husband. Is the deed of trust valid, notwithstanding that it specifies possession, and that it is executed in favor of a female; and had Moohummud Tuqee, who obtained the grant of the lands, a right to appropriate the whole of them to pious uses, or only such part of them as may have fallen to his share by right of inheritance from his wife, who was daughter of Abdoo Soobhan, (the original proprietor) and mother of Ali Nuqee? If he had a right to appropriate a part only, is the deed of trust, conveying the whole, good and valid as to the part which he had a right to appropriate?

Of an endowment of joint undivided landed property.

R. The proceedings do not clearly show whether the lands in question were formerly the property of Abdoo Soobhan, and after resumption the right to them was confirmed in the person of Moohummud Tuqee, or whether he obtained the grant *de novo*. But it appears however from an acknowledgment of Moohummud Tuqee, which is on record, and it may also be collected from the tenor of the question, that Abdoo Soobhan was formerly proprietor of the lands, and that after resumption, the right to them was confirmed in the person of Moohummud Tuqee, by the ruling power. Under these circumstances, the estate must be considered to have belonged to Abdoo Soobhan, deceased; and to be divisible in the first instance among his heirs and their representatives, and ultimately between Moohummud Tuqee and Ali Nuqee, who are represented by Koolsoom Khanum and Mirza Mehdee. The legal shares of the parties are set forth in the subjoined table. The appropriation by Moohummud Tuqee of the whole of the lands, including the share of his son, to the

support of mosques and religious edifices, is not legal or valid; and according to the doctrine of Imam Moohummud, the appropriation of his own share even, from the circumstance of its being undefined, is illegal. But according to Aboo Yoosuf, whose opinion is followed in this particular by many lawyers, the appropriation of his own share is legal; and the conferring the trust of the appropriation on a female, is universally allowed to be legal. It is advisable, in this instance, to follow the doctrine of Aboo Yoosuf; and to declare the appropriation by Moohummud Tuqee of his own share, to be legal, as well with a view to uphold his disposition, as to secure the rights of the other heirs, whom he by his act intended to exclude. Supposing the lands never to have been the property of Abdoo Soobhan, but to have been acquired *de novo* by Moohummud Tuqee, and supposing it not to appear, that his wife obtained possession of them under the deed executed by him, the appropriation, according to the doctrine of Moohummud, whose opinion in this particular is followed by many lawyers, is invalid; and on this supposition, the property left by Moohummud Tuqee, will be distributed among his heirs according to their legal shares, which are set forth in the subjoined table. If in this case the doctrine of Imam Moohummud be followed, and the appropriation declared invalid, the heirs will not be excluded. If, on the other hand, the doctrine of Aboo Yoosuf be followed and the appropriation declared valid, the heirs will be excluded. Under all circumstances therefore it is better to adopt the opinion of Imam Moohummud.

Of an endowment, the appropriator not giving possession to the trustee.

Disposition of the property, supposing it to have descended from—

Abdoo Soobhan, deceased.

Of a son with two daughters.

Son	Daughter	Daughter
Moozuffer Hoosein,	Misree Khanum,	Hyatee Khanum,
2 shares.	1 share.	1 share

Moozuffer Hoosein, deceased : — *Of two sisters.*

Sister	Sister
Misree Khanum,	Hyatee Khanum,
1 share.	1 share.

Misree Khanum deceased : — *Of a husband with two sons and a sister.*

Sister	Husband
Hyatee Khanum,	Moohummud Tuqee,*
	2 shares.
Son	Son
Ali Nuqee,	Husun Uskuree,
3 shares.	3 shares.

And after the death of Hyatee Khanum—

Hyatee Khanum, deceased : — *Of a husband with two sons of a sister.*

Husband	Sister's Son	Sister's Son
Moohummud Tuqee,	Husun Uskuree,	Ali Nuqee,
4 shares.	2 shares.	2 shares.

Husun Uskuree deceased : — *Of a father with a brother.*

Brother	Father
Ali Nuqee,	Moohummud Tuqee,
	5 shares.

TOTAL.

Ali Nuqee, 5 shares. Moohummud Tuqee, 11 shares.

Disposition of the property, supposing it not to have descended from Abdoo Soobhan, and Hyatee Khanum to survive her husband—

Moohummud Tuqee, deceased : — *Of a son with three widows and three daughters.*

Wife	Wife	Wife
Hyatee Khanum,	Hinda,	Zeinub,
5 shares.	5 shares.	5 shares.

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* Moohummud Tuqee married two sisters, namely, Hyatee Khanum and Misree Khanum, both daughters of Abdoo Soobhan. It may here be observed that although a man is prohibited by Law from marrying his wife's sister, his wife being alive, yet that after her decease he may lawfully marry her sister.

Son	Daughter	Daughter	Daughter
Ali Nuqee,	Khudeeja,	Fatima,	Ayesha,
42 shares.	21 shares.	21 shares.	21 shares.

Or converted into cash, the shares of the females will be ten annas eight gundas in the rupee, and the share of Ali Nuqee will be five annas twelve gundas.*

CASE LXX.

Q. A man dies, leaving a widow, a mother and a sister. In this case how will his estate be distributed ?

Of a sister with a mother, and a widow.

R. Agreeably to the doctrine in cases of increase, the estate of the deceased should be made into thirteen shares, of which his widow is entitled to three, his sister to six, and his mother to four.†

CASE LXXI.

Q. A woman dies, leaving as her heirs a daughter, a mother, a father and a husband. Under these circumstances to what proportion of the dower of the deceased woman is her mother entitled ?

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* This is a simple example of the Seventh Rule of Distribution (81), where there is a fraction remaining in the shares of two sets of sharers, and on a comparison between the respective numbers of the sharers, they appear to be prime to each other. Thus the share of the wives being one-eighth, the property must be made into eight shares at least, of which the wives will take one share; but one cannot be divided among three without a fraction, nor can the seven remaining shares be divided among the other five (three daughters and one son whose share being double is counted two) claimants without a fraction. But three (the number of the wives) is prime to five (the number of the other claimants). In such case the rule is that the one number of sharers be multiplied by the other, and the product multiplied into the root of the case. Thus: $3 \times 5 = 15 \times 8 = 120$.

† This case affords an example of the doctrine of the increase. See Prin. Inh. 68 and 90. In the first place the property should have been made into twelve parts, according to Prin. Inh. 65; the shares of the claimants being a fourth, a third and a half. But when the widow has taken her fourth or three, and when the mother has taken her third or four, there will not remain half for the sister; and the number 12 must therefore be raised to 13, to enable all the heirs to obtain their respective portions.

R. The entire estate of the deceased woman, whether consisting of dower or of other property, should be made into thirteen parts, of which her mother is entitled to two, her father to two, her husband to three, and her daughter to six shares.* Of a daughter with a mother, a father, and a husband.

CASE LXXII.

Q. A person dies, leaving two daughters begotten by himself on a slave girl, who also survives him. In this case is the slave girl, who is the mother of those daughters, entitled to any portion of the estate of her master? If so, how will the property be shared among the three individuals above-named?

R. Under these circumstances the female slave has no right to any share in the estate. Should the above question contain a correct exposition of the state of the family, the property must first be applied to defray the expenses of the burial of the deceased, then to the discharge of his just debts; and if there remain any surplus, it shall, according to the Divine Law, be made into three parts, of which two will go to the daughters or one share to each, and the remaining one to the residuary heir, if there be any. On failure of such residuary, the whole property, in virtue of their legal shares and of the return, will be vested in the daughters, as is laid down in the Law tracts treating of such succession. In the *Sirajya*,—"Impediments to succession are four; 1st, servitude, whether it be perfect or imperfect." The expressions "perfect" indicate absolute slavery, and "imperfect" indicate *Moodubbirs* and *Mookatibs*, and those who are mothers of offspring. "Daugh- Of two daughters and their mother, who was the slave of the deceased proprietor.

* This case affords another example of the doctrine of the increase. See note to Case 70.

ters begotten by the deceased take in three cases—half goes to one only and two-thirds to two or more."*

CASE LXXIII.

Q. 1. A woman dies, leaving a sister, a husband, several brothers' sons, a paternal unlce's son, and children of her other sisters. Under these circumstances, on whom, among the persons enumerated, will her property devolve on her death?

Of nephews, nieces and cousins with a husband and sister.

R. 1. Her brothers' sons, her paternal uncle's son, and the children of her other sisters, have no right of inheritance while the sister and husband of the deceased are living. The property therefore must be divided into two parts, one-half of which will go to the sister and the other to the husband.

Q. 2. The husband dies, leaving only one sister and no other sharers or residuaries. On whom will his property legally devolve under such circumstances?

Of a sister, being the only heir.

R. 2. As the sister is the only claimant, there being no other sharer nor residuary, she will take the whole property left by her brother, (whether derived to him from his wife or otherwise) half in virtue of her legal share, and half for the return.†

CASE LXXIV.

Q. On the death of Gholam Hoosein, his widow became possessed of his lands in proprietary right. She died, leaving an uterine sister, and a sister by the same

* This case exemplifies the doctrine of the return. See Prin. Inh. 92. The legal share of the daughters is only two-thirds of the property, but there being no other heirs, they take the surplus third, which reverts to them.

† See Prin. Inh. 92.

father only. Will the lands, of which she died in possession, go to the persons above-mentioned, or will they devolve on the widow of Gholam Hoosein's brother or his brother's sons; and if so, to what proportions will they be entitled?

R. The widow of Gholam Hoosein having been in possession of the lands as proprietor, they will devolve, as a matter of course, on her uterine and half-sister by the same father, the former of whom will take three parts and the latter one.* Of a half-sister by the same father with an uterine sister.

CASE LXXV.

Q. A man dies, leaving a widow and two daughters. What shares of his property will these persons take respectively?

R. The whole property will be divided into sixteen shares, of which two shares will go to the widow and seven to each of the daughters.† Of a widow with two daughters.

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* This case exemplifies the doctrine of the return. See Prin. Inh. 93. The property should originally have been made into six; the share of the half-sister by the same father only being one-sixth with an uterine sister, and the legal share of the uterine sister being one-half. See Prin. Inh. 23 and 27. But the sixth of that number (6) is one, and the half is three. Consequently by making the entire estate into four parts and giving three to the uterine and one to the half-sister, each will obtain her proper share.

† This also is a case in which the doctrine of the return is exemplified. There being one of the heirs not entitled to a return, the calculation has been made agreeably to that laid down for the third class of persons entitled to share in the return. See Prin. Inh. 94.

Thus the smallest number into which the estate can be divided, consistently with giving the widow (who is not entitled to a return) her share of the inheritance (which is an eighth) is eight; but after she has taken her share, there remain seven to be divided among the heirs entitled to a return, which obviously cannot be done without a fraction. In this case the proportion between the number of those entitled to a return and of the number of shares left for them must be ascertained. Thus: $2 \times 3 = 7 - 1$, which giving a *Mootubayun* or prime result, the number eight, into which the estate was originally divided, must be multiplied by the whole of the number of those entitled to a return. Thus: $8 \times 2 = 16$. It should here be observed that neither the husband nor wife have any legal claim to the return, and when they are associated with other heirs, the surplus reverts exclusively to such heirs.

CASE LXXVI.

Q. A person died, leaving a mother, a wife and two daughters of his uterine brother. In what proportions will his patrimonial property be distributed among the claimants above enumerated?

Of a widow with a mother.

R. The whole estate of the deceased, after defraying the necessary expenses, should be made in the first instance into twelve* parts;—but being a case in which the return operates, the twelve parts should be reduced to four, to one of which the widow is entitled and the mother will take the remaining three as her legal share, and on account of there being no other residuary heir, as the return also. The daughters of the uterine brother of the deceased are enumerated among the distant kindred, and they can never take any share of the property so long as there is a legal sharer.

Of brothers' daughters with a widow and a mother.

CASE LXXVII.

Q. A person dies, leaving a widow and a daughter, the relation of which persons to the deceased is established. In what proportions will these two persons inherit the property left by him?

Of a widow with a daughter.

R. The property of the deceased will be made into eight parts, of which the widow will take one, and the daughter the remaining seven. This is on the supposition that the deceased left no residuary heirs. In the event of there being any persons of this description, the

* The mother's share being a third by Prin. Inh. 34, and the widow's a fourth by Prin. Inh. 14, the property should, by Prin. Inh. 65, be made into twelve parts; but being a case of return, it should be reduced to the smallest number of which it is susceptible consistently with giving the person excluded from the return her share of the inheritance, which being in this instance one-fourth, the property should be made into four. See Prin. Inh. 94.

daughter will take four shares only, and the remaining three will be made over to the residuary heirs.*

CASE LXXVIII.

Q. A woman who had a daughter by a former marriage, purchased some landed property with her own money, and procured the title deeds of it to be made out in her own name and that of her second husband. She continued in possession of the property during her lifetime, and on her death, her second husband having take possession, made it over by gift to his second wife, who on his death became seized accordingly. The daughter of the first wife and the second wife are now disputing about the proprietary right to the land. Under these circumstances, which of them are entitled to it,—and if both, in what proportions? and had the husband any right to make over to his second wife all the property, notwithstanding there was a daughter of his first wife living?

Property purchased by a woman with her own money is exclusively her own, notwithstanding the insertion of her husband's name in the title deed.

R. If the landed property, the title deed for which was made out in the name of herself and of her husband, was purchased by the woman with her own money, such property must be considered exclusively hers; because, it is a maxim in Law that regard is had to the real and not to the nominal state of the case. According to this supposition the husband had no right whatever to make over the property to his second wife by gift, and, supposing there to be no other

* There being a child, the share of the widow is one eighth, and the daughter being the only child, her legal share is half of the whole property; but as neither the wife nor the husband are entitled to any return, it is requisite that the three surplus shares should revert to the daughter if there be no other residuary heirs. If there be any, they of course take the surplus three shares, and the daughter obtains only her legal share, which is one-half or four parts out of eight. See Prin. Inh. 94. The smallest number of shares into which the estate can be divided, consistently with giving the widow her share, is eight.

heirs, it should, on the death of the first wife (who was the proprietor), have been made into four portions, of which three belonged to her daughter by the former marriage and one to her second husband.*

Of a daughter with a husband.

CASE LXXIX.

Q. Moohummud Wasil had three wives. By his first wife (Mussummaut Fuhmeeda) he had a son, named Ruhm Ali, and a daughter named Fyzoonisa; by his second wife he had a daughter, named Buhorun, and by his third wife a daughter, named Soopun. After his death the daughter (Soopun) of his third wife died. Qasim Ali, the son of Soopun, died before her. The daughter of Qasim Ali (Durgahin), that is to say, the grand-daughter of Soopun, is living. Ruhm Ali died leaving a widow, who is living; his sister Fyzoonisa, and Buhorun the daughter of Moohummud Wasil's second wife, are living also. Under these circumstances, how will the property be distributed among them?

Case of a son's widow with two daughters and the daughter of another

R. Supposing Ruhm Ali to have died before Mussummaut Soopun, the whole property left by Moohummud Wasil will be distributed into seven hundred and twenty† shares, of which two hundred and seventy-two parts,

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* This is an example of the doctrine of the return agreeably to that laid down for the third class of persons entitled to share the return. See Prin. Inh. 94.

† This is a case of vested inheritance—no distribution of the property having taken place during the lifetime of the persons who successively died; and the following is one method by which the calculation may be arrived at:—

SKETCH OF THE FAMILY.

Moohummud Wasil, deceased:

Wife,		Wife,	Wife,
Daughter,	Son,	Daughter,	Daughter,
(Fyzoonisa.)	(Ruhm Ali)—wife.		Son,
			Daughter.

On the death of Moohummud Wasil his heirs are his three widows, his three daughters and his son. Now the widows get one-eighth of the property where there are children, as in this instance. To give them their share, and at the same time to give the son a share double that of the daughters without leaving a fraction, it is necessary to find out the smallest

the share of Ruhm Ali, will go to his widow; one hundred and ninety-five parts will go to Mussummaut Buhorun, and one hundred and seventy-five parts will go to the sister of Ruhm Ali, daughter of Mussummaut Fuhmeeda; and seventy-eight shares to Mussummaut Durgahin. Supposing on the other hand Ruhm Ali to have died after Mussummaut

daughter's son, the proprietor's son having died before his deceased sister and her son.

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number which will give that result. It is obvious that eight will not, but as 1 is to 8, so is 15 to 120. Thus the widows will each get five shares, altogether fifteen shares or one-eighth of 120. The son will get forty-two shares, or double that of each of the daughters. On the death of the second and third widows their shares will go to their daughters, who will thus have twenty-six shares each. On the death of the first widow her five shares should have been divided between her son and daughter in the proportion of two to one; but her whole property consisting of five shares, it is impracticable to distribute it in this manner without a fraction. A higher number must therefore be sought. As 1 is to 5, so is 6 to 30, of which the son will be entitled to 20, and the daughter to 10. On the death of the son his whole property goes to his widow in satisfaction of dower. On the death of the daughter of the third widow, her property should have been divided into four parts, of which two would go to the daughter of her son, and one to each of her half-sisters. But, her whole property consisting of twenty-six shares, it is impracticable to distribute it in this manner, without leaving a fraction. A higher number must therefore be sought. As 1 is to 26 so is 6 to 156. Of this number seventy-eight shares will go to the grand-daughter, and thirty nine to each of the half-sisters. But it having been found necessary to make an increase with respect to one share, it becomes necessary to increase all the shares proportionally. Thus: as 1 is to 120 so is 6 to 720. Thus the share of the widow of Ruhm Ali will be $42 \times 6 + 20 = 272$. The share of Buhorun will be $26 \times 6 + 39 = 195$, and the share of Fyzoonisa will be $21 \times 6 + 10 + 39 = 175$. The remaining seventy-eight shares go, as was before stated, to the grand-daughter. On this calculation it is supposed, that the distribution did not take place until after Ruhm Ali's death, and that he died before his half-sister Soopun, which circumstance (as he himself could not inherit from Soopun) precludes his widow from a share of her property.

But in the event of Soopun's dying before Ruhm Ali, her grand-daughter will get half and the remainder will be distributed between her two half-sisters and her half-brother (Ruhm Ali) in the proportion of two to one to the brother; but Soopun's share consisting of twenty six, it is plain that this distribution cannot be made without leaving a fraction. A higher number must therefore be sought. As 1 is to 26 so is 12 to 312. Of this number one hundred and fifty-six shares will go to the grand-daughter, seventy-eight to the half-brother, and thirty nine to each of the half-sisters. But it is necessary to increase the other shares proportionally. Thus: as 1 is to 120 so is 12 to 1,440. The share of Ruhm Ali and consequently of his widow, will then be $42 \times 12 + 40 + 78 = 622$. The share of Buhorun will be $26 \times 12 + 39 = 351$. The share of Fyzoonisa will be $21 \times 12 + 20 + 39 = 311$. The remaining one hundred and fifty-six shares go, as was before stated, to the grand-daughter.

The above is not a very scientific process, and would in most instances involve greater trouble than a recourse to the prescribed rules, for examples of which see the following cases and their annotations.

And if the son died after his deceased sister and her son.

Sooopun, the property will be distributed into one thousand four hundred and forty shares, of which six hundred and twenty-two parts, the share of Ruhm Ali, will go to his widow in the event of so much having been assigned in dower; three hundred and eleven parts will go to the daughter of Mussummaut Fuhmeeda; three hundred and fifty-one parts will go to Mussummaut Buhorun, and one hundred and fifty-six parts to Mussummaut Durgahin, the daughter of Qasim Ali, son of Soopun.

CASE LXXX.

Q. A proprietor of a landed estate dies, leaving a son, a daughter, and a half-brother by the same father only. After his death the son also dies childless; and the daughter, during the lifetime of her paternal half-uncle, takes possession of the entire estate. Is she, under these circumstances, entitled to the whole, or to what part?

Of a daughter, with son and uncle, the son dying before distribution.

R. Under these circumstances, the share of the daughter is two-thirds, and that of her paternal half-uncle one-third, that is to say, the property will be distributed into three parts, of which two will go to the former, and one to the latter as residuary heir.*

* This is a simple example of the doctrine of Vested Inheritance (see Prin. Vest. Inh. 96, 97, 99). At the distribution which should have taken place on the death of the original proprietor, his brother (see Prin. Inh. 21) was not entitled to any part of the property left by him, there being a son. His property should then have been made into three parts, of which his son was entitled to two and his daughter to one. On the death of the son, his two shares should be compared with the number of shares into which it is requisite to make his estate, which is in this case two, the sister's share (see Prin. Inh. 23) being one moiety, and the other moiety going to the paternal half-uncle (brother of the original proprietor) as residuary heir. Two and two are concordant, but the measure of the number of shares being half or only one, the multiplication directed in Prin. 99 is of course needless.

CASE LXXXI.

Q. A woman died, leaving as her heirs four daughters, one son, and a husband. The son died previously to any distribution of the property, leaving his four sisters and his father. Under these circumstances, how will the surviving heirs, being the husband and four daughers, share the property?

R. According to law, if the whole property belonged to the deceased woman, it should, in the first instance, have been applied to her funeral expenses; then to the payment of her legacies out of a third of the residue, and after such payment, if there remained any surplus, it should have been made into eight shares, of which four should go to her husband, and the remaining four to her four daughters or one share to each of them.* Case of a son, four daughters [illegible] hus[illegible] the son [illegible] before [illegible] distribution.

CASE LXXXII.

Q. 1. A person dies, having divided his estate equally between his son and daughter, during his lifetime: afterwards the son dies, leaving his sister and a wife. Under these circumstances, will his sister inherit; and what share of his property?

R. 1. According to law, the estate of the second deceased, that is to say, of the son, will be made into four shares, of Of a sister with a widow

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* At the distribution, which should have taken place on the death of the original proprietor, her heirs being her husband, her son and four daughters, her property should have been made into eight parts, of which the husband was entitled to two shares, her son to two, and her four daughters to the remaining four shares or one share each.

At the distribution which should have taken place on the death of the son, his sole heir was his father, who was entitled to take his two shares which he inherited from his mother, without making any provision for his sisters out of it.

Consequently the property should be made into eight parts, of which the husband will take four, that is to say, two which he inherited from his wife, and the other two from his son, and the daughters the remaining four or one share each, which they inherited from their mother.

which one will go to the widow and the remaining three to the sister of the deceased.

Q. 2. Supposing the first person to have died, without having made any division of his estate, leaving a son and daughter, and the son to die subsequently, leaving a wife, the property still remaining undivided ; how much of the property will devolve on the son's wife, and how much on the daughter ?

Of a daughter with a son's widow, the son dying subsequently to his father.

R. 2. In the first instance, the property of the first deceased will be made into three shares, of which two belonged to the son and one to the daughter. Afterwards of the four shares belonging to the second deceased (the two shares of the son having been raised to four) three will go to his sister and one to his wife. Therefore, the whole estate of the first deceased should be made into six parts, of which one should be awarded to the widow of his son, and five to his daughter.

Q. 3. Supposing the wife of the second deceased to have had a daughter by her husband, which daughter died at the age of five years. Under these circumstances, to what proportion of the property will such daughter be entitled ? and after her death, on whom will her share devolve ?

Of a daughter with a son's widow, the son dying subsequently to the father, but leaving a daughter, who is also dead.

R. 3. Under the circumstances stated, the property of the first deceased will be made into three shares, of which the son will take two and the daughter one ; and on the death of the son his two shares will be raised to eight, of which one will go to his widow, four to his daughter, and three to his sister ; and on the death of the daughter, the four shares appertaining to her will devolve on her mother. The whole estate of the first deceased, therefore, should be made into twelve

parts, of which five should be awarded to the widow of his son and seven to his daughter.*

CASE LXXXIII.

Q. A person dies, leaving his wife A, three sons B, C and D, and three daughters E, F, (by his wife A) and G by another wife. After his death, and before the property is distributed, his widow A, two of his sons B and C, and one of his daughters G, successively die. The surviving heirs there-

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* These questions afford very easy examples of cases of vested inheritance.

At the first distribution, the estate should have been divided into three parts, to give the son twice as much as the daughter. At the second distribution the estate of the son should have been made into four parts, the share of the wife being one-fourth. But, being a case of vested inheritance, the proportion must be ascertained between the number to which the deceased son was entitled and the number into which it is necessary to divide the estate. Thus: $2 \times 2=4$, which agreeing in 2, the rule is (see Prin. Vest. Inh. 99) that the number of the shares of the original division (aggregate and individual) be multiplied by half the number of the portions of the second class of heirs, and these last by half the number of shares to which the deceased was entitled, (which being in this case only one, multiplication is needless.) Thus: $3 \times 2=6$, of which the widow will take one and the daughter 5, according to this table:

PROPOSITUS $3 \times 2=6$.

A — Son, 4. B — Daughter, 2.

Son 4.

C — Son's widow, 1. B — Sister, 3.

So also, in the third question, at the second distribution, the estate of the son should have been made into eight, the share of the widow being one-eighth and of the daughter one-half, but 2 and 8 also agree in 2, and agreeably to the Principle quoted in illustration of the answer to the former question, 3 must be multiplied by 4. Thus: $3 \times 4=12$, of which the son's sister takes 7, 4 in right of her father and 3 in right of her brother, the son's daughter 4 as her legal share of half, and the son's widow 1 as her legal share of one-eighth. On the third distribution the whole estate of the daughter goes to the mother, and the sister's share is not increased: according to this table.

PROPOSITUS $3 \times 4=12$.

A — Son, 8. B — Daughter, 4.

A

Son 8.

B — Sister, 3. D — Daughter. 4. C — Widow, 1.

fore are D, E and F. In what manner, and in what proportions, will the property of the original proprietor be distributed among them ?

Case of a widow, three sons, three daughters and the daughter of another wife; and the widow, two sons, one daughter, and the daughter of the other wife dying successively.

R. It will be made into one thousand seven hundred and twenty-eight shares, of which D will get eight hundred and sixty-four shares, and E and F four hundred and thirty-two each. The following table will exhibit the manner in which the surviving heirs succeed to the interests vested in them by the death of their relations, who died subsequently to the original proprietor, but previously to the distribution being carried into effect.

72 × 8=576 × 3=1728.

Of three sons with three daughters and a widow.

A.	B.	C.	D.	E.	F.	G.
9.	14.	14.	14.	7.	7.	7.==72.
.	112.	112.	112.	56.	56.	56.
		336.	336.	168.	168.	168.

A,

Deceased.

Of three sons with two daughters.

B.	C.	D.	E.	F.	G.
2.	2.	2.	1.	1.	0.==8.
18.	18.	18.	9.	9.	
	54.	54.	27.	27.	

B,

Deceased.

Of two brothers with two sisters.

C.	D.	E.	F.	G.
2.	2.	1.	1.	0.==6.
130.	130.	65.	65.	0.

C,

Deceased.

Of a brother with two sisters.

D.	E.	F.	G.
2.	1.	1.	0.==4.
260.	130.	130.	

G,

Deceased.

Of a half-brother and half-sisters.

D.	E.	F.
84.	42.	42.

TOTAL.

D.	E.	F.
864.	432	432.*

CASE LXXXIV.

Q. A person dies, leaving two sons, who are uterine brothers, and who divide the paternal estate equally, each retaining possession of his own share. Some years subsequent

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* This case affords a good illustration to the rule respecting the succession to vested interests. With a view to distribute the property of the *propositus*, in the first instance, recourse must be had to the Third Prin. of Dist. (77). For the widow having a right to one-eighth, it is evident that the property cannot be made into less than eight shares; but besides her there are nine claimants, one son being counted as two daughters, and after her eighth is withdrawn, it is obvious that the remaining seven shares cannot be distributed among the nine claimants, without a fraction. It consequently becomes necessary to find the proportion between the sharers and the shares, which appears to be, that they are divisible by an unit only, or, that they are, what is termed, *Mootubayun* or prime. Thus: 7=9—2 and 2 × 3= 7—1, in which case the rule is, that the number of sharers must be multiplied into the total number of shares. Thus: 9 × 8=72, the product required.

Among the second class of sharers, the first rule of distribution applies. The step-daughter gets nothing, and by making the property into 8, (the number of sharers, a male being counted for two females,) it may be distributed without a fraction. But as the property of the widow was not distributed at the time of her death, it is necessary to find out the extent of the vested interest to which each heir is entitled; it is requisite that the proportion be ascertained between the aggregate of their shares and the amount to which the widow was entitled at the preceding distribution, which is found to be 9. Thus: 8=9—1. These numbers therefore are divisible by an unit only or are *Mootubayun*, in which case the rule is (See Prin. Vest. Inh. 98) that the aggregate and the individual shares of the first class should be multiplied by the aggregate of the shares of the second class. Thus: 72 × 8=576, and 14 × 8=112, and 7 × 8=56, after which the individual shares of the second class must be multiplied by the amount to which the widow was entitled at the preceding distribution. Thus: 2 × 9=18 and 1 × 9=9.

Among the third class of sharers also, the first rule of distribution applies for the same reasons; and in order to ascertain the extent of the vested interest of each heir, the same process must be had recourse to. Thus B the deceased had

to the division of the inheritance the younger son dies, leaving a widow and four daughters. The widow, on the death of her husband, takes possession of his property, which she retains for several years, and no distribution of her husband's property took place during her lifetime. Of the deceased's daughters three are married and one continues unmarried. Afterwards the widow dies; but four or five years prior to her death her husband's brother and his son and grand-son took possession of the property left by her husband and retained the exclusive enjoyment of it. It does not appear whether the possession was obtained forcibly or by the consent of the widow. All the four daughters are still living, and one of them now lays claim to a fourth part of the property left by her deceased father, bringing her action against her elder sister, who is the wife of her uncle's son, against her uncle's son, and against his grand-son, who are in posses-

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112 shares at the first distribution, and 18 at the second.—total, 130; but the aggregate of the sharers of the present class is 6. The proportion between these two numbers is that they agree in 2, or are, as it is termed, *Mootuwafiq* or composit. Thus: 6 × 21 = 130—4 and 4 = 6—2, in which case the rule is (See Prin. Vest. Inh. 99) that the aggregate and individual shares of the first class and the individual shares of the second class (as produced by the preceding results,) should be multiplied by half the sum of the shares of the third class. Thus: 576 × 3 = 1728, and 112 × 3 = 336, and 56 × 3 = 168, and 18 × 3 = 54, and 9 × 3 = 27, after which the individual shares of the third class must be multiplied by half the amount to which B was entitled at the preceding distribution. Thus: the half of 130 is 65, and 65 × 2 = 130, and 65 × 1 = 65.

Among the fourth class also the same rules apply. Thus C the deceased had 336 at the first distribution, 54 at the second, and 130 at the third. Total 520 but 4 × 130 = 520, and the proportion is, that they agree in 4, or are, as it is termed, *Mootudakhil* or concordant, in which case the rule is (See Prin. Vest. Inh. 99) that the aggregate and individual shares of the first class, and the individual shares of the second and the third classes, should be multiplied by a fourth of the sum of the shares of the fourth class. But one being the fourth of 4, multiplication is needless—after which the individual shares of the fourth class must be multiplied by a fourth of the amount to which C was entitled at the preceding distribution. Thus the fourth of 520 is 130, and 130 × 2 = 260, and 130 × 1 = 130.

G dying, of her 168 shares her half-brother will take 84, and her half-sisters will take 42 each. Thus the survivor D will receive 84 + 260 + 130 + 54 + 336 = 864, and E will receive 42 + 130 + 65 + 27 + 168 = 432, and F will receive 42 + 130 + 65 + 27 + 168 = 432.

sion. According to the Moohummudan Law, is the claimant entitled to a fourth part of her parents' property or to any proportion less than a fourth? and supposing her to have the right, is it fit that, she being married, the action should be brought in her name, or in that of her husband?

Of a brother which a widow and four daughters, the widow dying before the distribution.

R. The original division of the estate between the two brothers was correct and proper. Now that disputes have arisen regarding the succession, the property of the deceased brother must be parcelled out in legal portions among the heirs, and for this purpose must be made into ninety-six shares, of which seventy-six will be allowed to the four daughters and twenty to the brother, and the share of each daughter, whether married or unmarried, will be nineteen. Consequently the claimant is entitled to nineteen out of ninety-six shares. It is a matter of no consequence whether the present possessors obtained the property by fair or by foul means; as the law recognizes no proprietary right for which some title cannot be shown, such as acquisition by gift or the like which does not here appear to have existed and such possession cannot bar the claimant's right. The husband of the claimant cannot under any pretence interfere in urging the claim preferred by her to her parents' property, the proprietary right to which is solely vested in herself.*

Suit by a married woman.

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* This is a case of vested inheritance. The division of the deceased brother's estate originally should have been by 24, according to Prin. Inh. 66, but as the widow died before distribution, the number of shares to which she died entitled should be compared with the number of her heirs. Her shares amounted to 3 and her heirs to 4, but these being compared give a *Mootubayun* or prime result, in which case the rule is (see Prin. Vest. Inh. 98) that the number of shares into which the property should first have been distributed be multiplied by the number of the heirs of the deceased. Thus : 24×4=96. of which number the daughters succeed to 64 or two-thirds in virtue of their own right of inheritance, and to 12 or one-eighth, in right of succession to their mother.

CASE LXXXV.

Q. A person dies, leaving two wives, four sons and two daughters; but the distribution of his estate did not take effect until after the death of his two wives and one of his daughters. By his first wife he had only one son, and by his second wife he had one son and two daughters—his other two sons were the offspring of another woman. The death of the first wife occurred before that of the second, and the death of the second before that of the daughter, who left a husband. Under these circumstances, into how many shares is the estate to be made, and to what proportions of it will the claimants be entitled respectively?

Of four sons with two daughters and two widows.

R. In the first place the property of the deceased is to be made into eighty shares, of which one-eighth or ten shares, will go to the widows, and they will take five each. The male issue will take a share double that of the female. Thus the sons will get fourteen shares each and the daughters seven each. On the death of the first widow her only son will be the sole heir to her property. The half-brother by the same father only, are excluded from participation. On the death of the second widow her five shares (being multiplied by the number of shares into which they must be distributed) will be increased to twenty, of which her son will take ten and her daughters five each, and the shares of the preceding results will be multiplied by four, the number of shares of the present class. Thus the share of the son on the death of the first widow: $5\times4=20$, and so with the shares of the sons and daughters on the death of the father: $14\times4=56$ (son's share); $7\times4=28$ (daughter's share), and the total number of shares $80\times4=320$. On the death of the daughter her property, which consists of thirty-three shares, will be made into one hundred and ninety-eight, of which her husband will be entitled to one-

Of a son with step-sons.

Of a husband with a brother and sister.

half or ninety-nine, and the other half will go to her whole-brother and her whole-sister in the proportion of a double share to the male. Thus the former will receive sixty six and the latter thirty-three shares. The half brothers will be excluded from the participation. The preceding results must again be multiplied by six, the number of shares of the present class. Thus: $10 \times 6=60$, and $5 \times 6=30$, and $20 \times 6=120$, and $56 \times 6=336$, and $28 \times 6=168$, and $28 \times 6=168$, and $320 \times 6=1920$, and of this the son by the first wife will receive $336+120=456$, the son by the second wife $336+60+66=462$, the daughter by the second wife $168+30+33=231$. The two other surviving brothers will be entitled to three hundred and thirty-six shares each, and the husband will take ninety-nine, as above stated.*

Of two wives, a son by the first, a son and two daughters by the second and two sons by another marriage; the two wives and one of the daughters dying successively, the latter leaving a husband.

* Among the first class of sharers an example is exhibited of the Fifth Principle of Distributon. The share of the two widows is one eighth by law, consequently the property must be made into eight shares at least and eight must be assumed as the root of the case; but besides them there are ten other claimants (one son always counting for two daughters.) Here it will be observed that there remains a fractional division in the allotments of both the wives and the children, for one share cannot be given to the two wives without a fraction, and after their share is taken away the remaining seven cannot be distributed among the other ten claimants without a fraction. In this case, after finding the proportion between the wives and their shares and the children and their shares (both of which prove to be *Mootubayun* or prime), it is requisite to find the proportion between the numbers of the sharers respectively, which proves to be *Mootudakhil* or concordant, in other words the smaller number exactly measures the greater. Thus: $2 \times 5=10$ when the rule is (see Fifth Prin. of Dist. 79, that the greater number be multiplied into the root of the case. Thus: $8 \times 10=80$. On the death of the first wife, her son being her only heir, no division takes place On the death of the second wife (to conform to the rule that a male shall have a portion double that of a female) her property must be made into four shares, but being a case of vested inheritance, the proportion must be ascertained between the number of shares to which she was entitled at the first distribution and the number into which her property is made on her decease. These two numbers, 4 and 5, are prime or are divisible by an unit only, no third number measuring them both; in which case the rule is (See Prin Vest. Inh. 98) that the shares (aggregate and individual of the preceding result) be multiplied by the aggregate of the shares into which the property of the last deceased is made. Thus: $80 \times 4=320$, and $5 \times 4=20$, and $14 \times 4=56$, and $7 \times 4=28$, and the individual shares of the present class be multiplied by the number of shares to which the deceased was entitled at the former distribution. Thus: $2 \times 5=10$, and $1 \times 5=5$. At the third division, on the death of the daughter, to conform to the rules that a

CASE LXXXVI.

Q. 1. A person dies, leaving as his heirs, a widow, a son and two daughters. Subsequently one of the daughters died, leaving no children, and next the widow of the proprietor died. The son of the proprietor then died, leaving a widow and a son, lastly his grand-son died. Under these circumstances, how, according to the Moohummudan Law, will the survivors (the daughter and the widow of the son of the original proprietor) share his property; no distribution having taken place during the lifetime of the deceased persons above-enumerated?

Of a widow, two daughters and a son; one of the daughters, the widow, the son (leaving a widow and a son), and lastly the grand-son successively dying.

R. 1. There are only surviving a daughter of the original proprietor and a widow of his son; the property will in this case be made into three shares, of which the widow of the son will take two and the daughter the remaining one: because, when the original proprietor died, he left a widow, a son and two daughters as his heirs. The widow's share was one-eighth of his property and the remainder belonged to his son and daughters, in the proportion of two shares for the male and one for the female; in other words, the son had a right to one-half and the daughters to the other half or a quarter each. On the death of one of the daughters, who left no issue, her share was to be made into three parts, of which two appertained to her brother, and the remaining one to her sister; and, after the death of the widow of the original proprietor, her

husband shall have a moiety where there are no children, and that a male shall have double the portion of a female, her property must be made into six shares at least, but, being a case of vested inheritance, the same process must be observed as in the last case. The result of the comparison of the numbers will be the same, for 33 and 6 are prime. Thus: 6 × 5=33—3 and 3=5—2 and 2=3—1. On multiplication according to the preceding rule the sum will be found to be 1920. Thus the preceding result 320 × 6=1920.

legal share was to have been made into three parts, of which her son would take two and the surviving daughter one; and of the share of the son of the original proprietor, which he should have inherited from his sister and mother, one-eighth will at his death go to his widow and the remainder to his son. On the death of his son, who was grand-son of the original proprietor, his whole property will be vested in his mother, because she is entitled to one-third as her legal share, and to the remaining two as the return. Under this distribution, two-thirds of the property of the original proprietor will devolve on the widow of his son and the remaining one on his daughter.* It is laid down in the *Sirajyya*,—" Wives

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* In this case of Vested Inheritance, the result must be arrived at by the following calculation :—

At the First Distribution the property should have been made into thirty-two parts, (the heirs being a widow, a son and two daughters, and the number eight not being divisible among the claimants without a fraction) agreeably to the Third Principle of Distribution (77); of which parts the widow should have got 4, the son 14, and the daughters 7 each.

At the Second Distribution, on the death of one of the daughters, the heirs being her mother, brother and sister, her property should have been made, agreeably to the Third Principle of Distribution, into eighteen parts, (the number six, into which it was necessary to make the estate, to give the mother her sixth, not being divisible among the claimants without a fraction) of which the mother was entitled to three, the brother to ten, and the sister to five; but this being a case of Vested Inheritance, it becomes necessary to compare the number of shares which the daughter had at her death with the number of shares into which her estate should be made. Thus: 7 × 2= 18—4, and 4=7—3, and 3=4—1, which giving a *Mootubayun* or prime result, the rule is (see Prin. Vest. Inh. 98,) that the aggregate and individual shares of the First Distribution must be multiplied by the aggregate of the shares of the Second Distribution. Thus: 32 × 18=576, and 4 × 18=72, and 14 × 18=252, and 7 × 18=126, and the individual shares of the second class must be multiplied by the amount to which the daughter was entitled at the preceding distribution. Thus: 3 × 7=21, and 10 × 7=70, and 5 × 7=35.

At the Third Distribution, on the death of the mother, her property should have been made, agreeably to the First Principle of distribution, into three parts, of which her son was entitled to two and her surviving daughter to one—but, being a case of Vested Inheritance, it becomes necessary to compare the number of shares which the mother had at her death with the number of shares into which her estate should be made. Her shares, according to the preceding results, amounted to 93—on the First Distribution 72, and on the Second 21, and the estate now should be made into three. Thus: 3 × 31=93, which gives a *Mootudakhil* or concordant result, showing that the numbers agree in 3, in which case the rule is (see Prin. Vest. Inh. 99,) that the aggregate and individual shares of the first distribution be multiplied by a third of the aggregate of the shares of the

Authority for the widow's succession.

take in two cases : a fourth goes to one or more on failure of children, and son's children, how low soever ; and an eighth with children or son's children, in any degree of descent." So also on the subject of the daughter's claim to inheritance,

For the daughter's

—" Daughters begotten by the deceased take in three cases ; half goes to one only, and two-thirds to two or more ; and, if there be a son, the male has the share of two females, and he makes them residuaries." So also the same authority treating

For the sister's

of a sister's right of inheritance,—" If there be brothers by the same father and mother, the male has the portion of two females ; and the females become residuaries through him by reason of their equality in the degree of relation to the deceased ;"

Third Distribution ; but the third of the aggregate in this case being only one, multiplication is one course needless, and the ninety-three shares which were the property of the mother at her death, must be divided between her son and daughter, the former getting a double share or 62, and the latter 31 This last result is obtained by multiplying the share of the son and daughter (2 and 1) by 31 or a third of the number (93) to which the widow was entitled.

At the Fourth distribution, on the death of the son, his property should have been made agreeably to the First Principle of Distribution, into eight parts, of which his widow was entitled to 1, and his son to 7, but being a case of Vested Inheritance, it becomes necessary to compare the mumber of shares which the son had at his death with the number of shares into which his estate should be made. His shares, according to the preceding results, amounted to 384 (at the First Distribution 252, at the Second 70, and at the Third 62,) and the estate now should be made into eight. Thus : 8 × 48=384, which gives a *Mootudakhil* or concordant result, showing that the numbers agree in 8; in which case the rule is (See Prin. Vest. Inh. 99,) that the aggregate and individual shares of the preceding distribution be multiplied by an eighth of the aggregate of the shares of the Fourth Distribution ; but the eighth of the aggregate in this case being only one, multiplication is of course needless, and the 384 shares which were the property of the son, at his death must be divided between his widow and his son, the former getting one-eighth or 48 shares, and the remaining 336 shares devolving on his son. This last result is obtained by multiplying the share of the son and widow (7 and 1) by 48 or an eighth of the number (384), to which the son of the original proprietor was entitled.

At the Fifth Distribution, on the death of the grand-son, his 336 shares should have gone to his mother. The widow of the son would thus have had 384 ; but the surviving daughter of the original proprietor inherited from her father, sister and mother 192 shares.

At the final Distribution therefore the property should be made into 576 parts, of which two-thirds or 384 should belong to the widow of the son, and one-third or 192 to the daughter of the original proprietor.

and on the subject of a mother's claim of inheritance it is stated.—"The mother takes in three cases; a sixth with a child, or a son's child, even in the lowest degree, or with two brothers and sisters or more, by whichever side they are related; and a third of the whole on failure of those just mentioned;" and it is laid down in the same book of Law on the subject of the return,—" The return is the converse of the increase; and it takes place in what remains above the shares of those entitled to them, when there is no legal claimant of it: this surplus is then returned to the sharers according to their rights."

For the mother's.

For the return.

CASE LXXXVII.

Q. A person dies, leaving a widow, a brother, a sister, his widow's mother and his widow' brother. The widow dies before the distribution. In this case, which of the survivors are entitled to inherit the estate of the deceased, and in what proportions?

R. In this case, all the persons enumerated in the above question will be entitled to share the inheritance. The estate should be made into twelve shares, of which the brother of the deceased will be entitled to six, his sister to three, his widow's mother to one and his widow's brother to two.*

Of a brother and sister with widow's mother and brother, the widow having died before the distribution.

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* The property in the first place must be made into four shares, the claimants being, on the death of the proprietor, his widow and his brother and sister This is the least number out of which the widow could get her share (one-fourth). She receives one; the brother two and the sister one. On the death of the widow her property will be made into three shares, the least number out of which the widow's mother could get her share (one-third). But according to the rule in cases of vested inheritance, her share (1) will be compared with the number of the division (3), and being found to be prime or divisible by an unit only (see Prin Vest Inh. 98), the aggregate and individual shares of the first class will be multiplied by the aggregate of the shares of the second—thus, 4×3=12 and 1×3=3, and 2×3=6 After which the shares of the present class should be multiplied by the number to which the widow was entitled at the former distribution; but that number being

CASE LXXXVIII.

Q. The proprietor of a certain estate dies, leaving two sons and four daughters by two different wives, one of whom survives him. After his death one of his sons, begotten on his first wife, dies, leaving three sons. The surviving son of the original proprietor, with the four sisters, who are by the same mother and father, and the three sons of his late half-brother, and his own mother, being nine in number, are the surviving claimants to the estate. Under these circumstances, according to Law, in what portions will his property be inherited by the nine individuals aforesaid?

Of a son, four daughters, a widow and three sons of another son, who died before the distribution.

R. In this case the property of the deceased ancestor will be made into one hundred and ninety-two shares, agreeably to the Law of vested inheritance, of which twenty-four shares will go to his surviving widow, forty-two to his son who is still living, twenty-one to each of his four daughters and fourteen to each of his three grand-sons, being the sons of his son who died subsequently to his death and previously to the distribution.*

CASE LXXXIX.

Q. The proprietor of half a dwelling-house and other property, inherited from his ancestor, dies, leaving

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only one, the multiplication is needless. Thus of the whole number 12, the brother of the original proprietor will get 6, his sister 3, his widow's mother 1 and his widow's brother 2.

*In this case of vested inheritance the property should agreeably to the Third Principle of Distribution (77) have been made into 64 parts to satisfy all the claimants who were entitled to share on the death of the ancestor; as in the first instance it should have been made into eight parts (the widow's share being an eighth), and as when the widow received her share, there remained only seven to be divided among the remaining eight claimants (one male counting as two females). Then on the death of one of the sons, his sixteen shares being compared with the number of his heirs or three, and proving prime, the number of the original division should be multiplied by the whole number of the second set of heirs. Thus; 64×3=192. See Prin. Vest. Inh: 98.

three sons and a daughter. Before any division of the patrimonial property has taken place one of the sons dies, leaving a widow besides his two brothers and his sister. Under these circumstances to what proportions of the property will the survivors be entitled to succeed respectively?

R. According to the Principles of Vested Inheritances the whole of the property left by the ancestor must be made into seventy portions, out of which each of the sons will be entitled to twenty-six, the daughter to thirteen and the deceased son's widow to five shares.*

Of two sons, a daughter, and the widow of another son who died before the distribution.

CASE XC.

Q. A person dies, leaving an only daughter, A, who subsequently dies, leaving a son, B, and husband, C, her surviving. The husband then dies, leaving as his heirs a widow, D, the son B, above-mentioned, begotten on his former wife,

* To arrive at this result it must first be ascertained to what proportions the three sons and the daughter would have been entitled, had the inheritance been distributed on the death of the ancestor; and as a male is entitled to double the share of a female, it follows that the property, to be distributed without leaving a fraction, must be made into seven parts, of which the deceased brother's portion would have been two shares. When he dies, his share is to be distributed among his two brothers, his sister and his widow. But the widow's share, legally, where there are no children, is one-fourth, and therefore the smallest number of portions into which the deceased's two shares can be made is four. Now after the widow's share has been taken away ther will only remain three to be divided among five (the sharers are called five, though in reality only three, one male counting as two females,) and the distribution obviously cannot take place without a fraction; in which case the rule is to search for the porportion between the sharers and the shares which is found to be *Mootubayun* or prime, or divisible by an unit only, which gives the Third Principle of Distribution (77). Thus: 4=5—1. The rule in the Third Principle is that the number of sharers be multiplied into the root of the case. Thus: 4 × 5=20, which result, were it not a case of vested inheritance, would furnish the number from which the several shares were to be extracted, but this being the case, the proportion between that result and the number of the deceased's former shares must be ascertained, which will be found to be consonant. Thus: 2 × 10=20, in which case the rule (see Prin. Vest. Inh. 99) is that the aggregate and individual shares of the preceding distribution be multiplied by the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus: 7 × 10 = 70, &c.

another son, E, by the wife who survived him, and four daughters, F, G, H, I, also by the surviving wife—the estate not having been distributed during his lifetime. In this case how will the property left by the deceased ancestor be shared among these individuals ?

Of a husband and son, the husband dying before the distribution and leaving a widow, another son and four daughters.

R. Under the circumstances stated, the property will be made into two hundred and fifty-six parts, of which two hundred and six shares will go to the son of the first wife, fourteen to the son of the wife who survived her husband, eight to the widow and the remaining twenty-eight to the four daughters or seven shares to each.*

CASE XCI.

Q. A person (A) dies, leaving a widow B, three sisters C, D and E, and F, the son of his paternal

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* In this case of vested inheritance the subjoined table may tend to illustrate the order of succession :—

PROPOSITUS.

A 4 × 64=256.

C 1 × 64=64 B 3 × 64=192.

C 1 × 64=64.

I	H	G	F	E	D	B
7	7	7	7	14	8	14==64.

At the distribution which should have taken place on the death of A, the property must have been made into at least four parts, to give her husband one-fourth Then, at the distribution which should have taken place on his death, the property belonging to him should have been made into at least eight parts, to give his wife one-eighth ; but when she has taken her eighth, as the remaining heirs cannot get their portions without a fraction, and as on a comparison of the number of them with that of the shares reserved for them, it gives a prime result, the number of the original division, see Third Prin of Dist (77 , must be multiplied by the number of such heirs which is eight, one male counting for two females. Thus : 8 × 8=64 Then, according to the Law of vested inheritances, the number to which the deceased was entitled at the First Distribution being compared with the number into which it is necessary to make the second, and being found to be prime, the rule is (see Prin. Vest. Inh. 98), that the aggregate and individual numbers of the first division be multiplied by the whole of the second, according to which process, the son by the first wife will get 206 shares ; 192 at the first and 14 at the second distribution.

uncle. Subsequently to his death one of his sisters, D, dies, leaving a daughter G, during the lifetime of the persons above named. Afterwards E dies, leaving a daughter H. Under these circumstances, according to law, how will the property of the original proprietor be distributed among the survivors?

Of a widow, three sisters and a paternal uncle's son; two of the sisters dying prior to the distribution, each leaving a daughter.

R. Under the circumstances above stated, after the performance of his (A's) funeral ceremony and burial without superfluity of expense, yet without deficiency, the satisfaction of his just debts, and the payment of his legacies out of a third of what remains after his debts are paid, the residue of the property left by A, according to the Law of Vested Inheritance, will be made into thirty-six parts, of which nine shares will go to B, fifteen shares to C, three to F, four to G and the remaining five to H.*

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* In the first instance the property should have been made into twelve parts, the portion of the widow being one-fourth and of the sisters two-thirds; and in this case the rule being that the division be made by twelve (See Prin. Inh. 14, 24 and 65.) But eight, which is two-thirds of twelve, cannot be distributed among the three sisters without a fraction, and three is prime to eight. Consequently in conformity to the Third Principle of Distribution (77) the number of the original division should be multiplied by the number of sharers who cannot get their portions without a fraction. Thus: 12 × 3=36, which must be distributed in the following manner:—

B	C	D	E	F
9	8	8	8	3

On the death of D, the number to which she was entitled at the former distribution (8) and the number into which it is necessary to make her estate (4), being *Mootudakhil* or concordant, no further process is necessary, and her eight shares will be distributed thus:—

C	E	G
2	2	4

So also on the death of E, by the same rule, of her ten shares, her daughter H will get one moiety and her sister C the other.
Vide Prec. of Gifts, Case XIV.

CHAPTER II.

PRECEDENTS OF SALE.

CASE I.

Q. Certain lands are the joint property of several individuals. One of the joint proprietors, without the consent of the rest, executes a deed in favor of a stranger, transferring to him a part of his right and interest in the said joint property, without making any specification of the boundaries; the deed merely reciting that the lands so transferred are his sole property. In this case is the deed valid?

Difference between the legal provisions of sale and gift.

R. If the deed, purporting to transfer to another the acknowledger's right to a part of his interest in a joint undivided estate, be a deed of gift, it will not be valid according to Law, without a specification of the boundaries, because an undefined gift is illegal: but, if it be a deed of sale, it will be valid; for, to this species of contract, partnership, indefiniteness and want of consent on the part of the joint proprietors, and non-specification of the boundaries, are no objections. The sale, therefore, must unquestionably be maintained as valid and binding.

CASE II.

Q. A person having rented a small piece of ground, and having built a house, and planted trees thereon, dies, leaving two sons, a wife, and a mother. On his death, and during the lifetime of the mother (the property being undivided), his wife and his sons sell every thing on the premises. Is the sale good, under these circumstances? or is the mother entitled to inherit any portion of her son's property? and if

so, to what proportions are the above mentioned persons severally entitled, of the deceased's property ?

R. If some of the heirs sell the undivided property specified in the question, the contract will be binding as far as regards their own shares. But any coheir, who was not a party to the sale, is entitled to recover his portion of the inheritance, his right not being defeated by their act.*

A sale of undivided property is good against the seller, but not against a stranger to the contract.

CASE III.

Q. A person, during his lifetime, having made his landed property into three equal parts, sold one part to each of his wives in satisfaction of their respective dowers. Part of the property so sold was parcelled off, and part continued undefined. Afterwards the son of the seller's second wife, having succeeded by inheritance to the share sold to his mother, sold such share to his own wife in satisfaction of her dower. The lands so sold, however, remained ostensibly in his possession and under his management. Is such sale valid according to Law, notwithstanding the want of proof as to the purchaser's seizin and possession ?

R. The validity of a contract of sale is not dependant on the immediate seizin of the purchaser, nor is at all affected by the property sold being undivided. The sale therefore, by the original proprietor, of his landed property in three equal portions to his three wives is valid, although some part of the portions was not defined. The son of the seller's second wife

Neither immediate seizin nor division essential in sale.

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* There is a distinction between the case of a sale, and of a gift in the Moohummudan Law. Had the property in the case in question been disposed of by gift, instead of by sale, the transaction could not have been upheld as valid, because, in the former case, seizin is necessary, which cannot take place, where the particular share or shares to be disposed of, are not distinctly separated and defined.
Vide Case No. VII.

succeeded to his mother's share by inheritance, and the sale by him of such share to his own wife, in satisfaction of her dower, is also valid, although he remained seized and possessed of the same subsequent to the sale. The purchaser is at liberty to make seizin thereof, at any time she may think proper.*

CASE IV.

Q. Zeyd sells his dwelling house, and the lands thereunto annexed, to Omar, stipulating for the sum of two thousand rupees as the price of the property sold, to which Omar agrees, and pays to Zeyd twenty-five rupees, as earnest money, promising to pay the remainder of the purchase money on a certain date, when the deed of sale was formally to be drawn out. Zeyd, being satisfied with these conditions, relinquishes the property to Omar, who takes possession accordingly, and places his own people on the premises. Under these circumstances is the sale complete? is either of the parties at liberty to retract? or is Omar compellable to pay the whole of the purchase money?

Circumstances under which a sale is complete and binding.

R. Under the circumstances stated the sale is complete; neither party is at liberty to retract; and the money is due from the purchaser. According to the *Hidaya*,—Sale is completed by tender and acceptance when both terms are expressed in the past tense, as, if one party should say, "I have sold;" and the other should say "I have bought." It is to be observed that, in like manner, a sale is established by any other words expressive of the same meaning; as if either of the parties for instance should say, "I am contented with the price," or "I have given you this article for

* The doctrine maintained in this is corroborated by what was laid down in the two preceding cases.
Vide Appendix Title Deed 2.—Ed.

a certain price," or "take this article for a certain price." When the declaration and acceptance are absolutely expressed without any stipulation, the sale becomes binding, and neither party has the power of retracting.* A sale is valid either for ready money or for a future payment, provided the period be fixed.† So also in the *Kunzooduqaiq*,—"A sale is a barter of one property for another by the mutual consent of the parties; it is completed by declaration and acceptance, and is valid either for ready money or for a future payment." Definition of sale.

CASE V.

Q. A person, by means of an agent, makes a sale, to his own son, of his real property, and executes a deed of sale thereof, in due form, properly sealed and attested. He, afterwards, by means of a deed of gift, makes a present to his son of the purchase money. He himself (the father) retains possession of the property on account of the minority of his son, and keeps by him both the deed of sale and the deed of gift. After the deed of sale (which did not specify any condition) had been completely executed, but before it was delivered to the purchaser, the seller became desirous of annulling it, alleging that he had executed it on the faith of a condition which had been infringed; and on claim being made in a Court of Justice, he declared the deed to have been executed subject to the condition alluded to, in corroboration of which assertion he urged the fact of his having continued in possession of the property sold and of his not having delivered up the deed of sale, stating that the condi-

* The purchaser may however retract in case of a defect or of the property purchased not having been inspected. See Prin. of Sale 21 and 26, and the *Hedaya*, vol. 2d, page 363. It may be observed that according to the doctrine of *Shafei*, the parties have an option of retracting until the breaking up of the assembly in which the contract was formed. But this opinion has been overruled.—*Ibid.*

† See Prin. of Sale 12 and 18.

tion upon which it was executed, had been violated by the mother of the purchaser, and that, therefore, the sale in question was invalid. Under these circumstances, is such sale legal and valid or otherwise?

Of sale by a father to his minor son.

R. If the father of the minor appointed a person to make the sale on his part, and that agent, in the presence of the father, declared that he had, in pursuance of his agency, sold certain property to the son, and the father expressed his consent to the declaration, the sale will be valid. If such was was not the case, or if the sale was accompanied by a condition at variance with the nature of such contract, it will be null and void. According to the *Foosool-i-Imadeeya* and the *Foosool-i-Oostoorooshee*,—"When a person commissions another to act as agent for him, in selling his property to his minor son, or as agent to purchase it for his minor son, the contract is not valid, unless the father be present and consent."* So also in the *Hidaya*,—"The insertion of any condition, which is not a necessary result of the contract, and in which there is an advantage either to the buyer or to the seller, or to the subject of the sale (if capable of enjoying an advantage), renders the contract invalid."† It remains for the

A sale with extraneous conditions is void.

Authorities.

* See Prin. of Sale 16. The principle on which this rule is founded is the prevention of usurious contracts and the occurrence of strife, after the completion of the bargain. One example given in the *Hidaya* is the sale of a slave, with a stipulation on the part of the seller, that the purchaser shall emancipate him. Here the condition invalidates the contract, because the purchaser is subjected to loss without an equivalent. The advantage, in this instance, is intended for the slave who is the subject of the sale. But it is otherwise where the condition, although not a necessary result of the contract, is not intended to confer advantage on either party, or on any particular individual, as where a person sells an animal to another, on condition that the purchaser shall sell it again. In this instance strife could not ensue, because no particular individual could prefer a claim against the purchaser. Vide *Hidaya*, vol. 2, page 416. Consequently in the case cited, if it appeared in evidence that the father, when he made the sale to his son, annexed to the contract a condition, calculated solely for his own advantage, the sale must have been held to be null and void.

† Vide Note to Case XVIII. Prec. of Gifts.—Ed.

Note.—Bailie at page 31 of his Law of Sale observes that "the thing sold is at the seller's risk until delivery." "If the seller were a father residing in his own house, and the purchaser his minor son living with him in family, there could be no seizin on the part of the son until the removal of the father from the house. Hence, if the house should fall to ruin while the father still resides in it, it perishes as his property"—Ed.

Court to investigate and decide, whether the sale referred to, was made in the manner first stated, which would establish its validity, or in the manner subsequently stated, which would render it null and void. But the wording of the deed is the same as that which is generally used in similar transactions of purchase and sale, and it does not appear from it that there existed any condition repugnant to the particular contract in question.

CASE VI.

Q. A woman having a minor son, who has no other guardian or protector but herself, sells a small portion of his landed property to realize funds for the purpose of instituting a suit to recover their joint estate, (in which she ultimately obtained judgment in her favour) and executes a deed of sale with the joint signature of herself and son. Under these circumstances is the deed so signed, and the sale founded thereon, valid or otherwise ?

Sale by a mother of her minor son's property.

R. The guardianship of a mother* does not extend to the exercise af any right over the property of her minor son. Therefore a sale by her of any portion of her minor son's immoveable property is totally illegal and inadmissible.†

* The same question having been propounded, on the ninth of the same month and year, to another Mooftee who was officiating for the established Law Officer, he replied that a mother was not competent to make a sale of her minor son's lands, even under the probable expectation of benefit accruing therefrom ; but that, as the minor had signed the deed of sale, his consent was proved, and that, if he possessed sufficient discretion to understand a negotiation of purchase and sale, such sale would be valid, on condition of its being approved by his father, or the executor of his father, or his paternal grand-father, or the ruling authority. This opinion, however, was not applicable to the case in question, the minor not having any such guardian at the time of the sale.

† The mother's guardianship extends only to the right of custody during infancy and to disposal in marriage ; but this last only in case of there being no paternal relations. The right over the property of wards is vested in the following

CASE VII.

Q. A person sells his portion of a maternal estate, specifying the number of shares, and acknowledges the sale, admitting that he had received the full value of the property sold. The purchaser also makes a declaration as to the validity of the transaction, and they both jointly prefer a claim against the coheirs of the seller to obtain possession of the property sold, with a view to the fulfilment of the contract. The defendants, in the suit which was preferred for this purpose, acknowledge the right of the seller. Under these circumstances is the sale legal and valid, and is the purchaser entitled to possession under it, or is the circumstance of the property not having been divided among the coheirs, sufficient to invalidate the contract. Supposing that the seller having admitted in his written claim above alluded to, that he had made the sale and received the purchase money, should, by entering into a combination with the defendants (one of whom is his grand-mother and the others his maternal aunts), withdraw his claim, will such retractation annul the right of the other claimant, that is to say, the purchaser?

Sale of an undivided share of landed property, with subsequent retractation.

R. The sale in question is in every respect valid and binding according to Law. The non-division of the property is not a disqualifying circumstance; according to the *Shurh-i-viqaya*,—"the sale of ten out of a hundred shares is allowable." So also according to the *Hidaya*,—"If a person purchase ten shares (of a house or bath) containing one hundred shares, it is valid in the opinion of all our Doctors." The retractation of the

guardians only, in the order enumerated:—The father, the guardian appointed by the father, the paternal grand-father, the guardian appointed by the paternal grand-father, and lastly the ruling power. See Prin. Guar. and Min. 5 and 8.

claim by the seller, after having acknowledged the sale, and the receipt of the full value, cannot in any manner invalidate the right of the purchaser; according to the *Hidaya*,— "When a person possessing sanity of mind and arrived at the age of maturity, makes an acknowledgment of a right, such acknowledgment is binding upon him." Under these circumstances, therefore, the purchaser is entitled to possession of the share sold.

CASE VIII.

Q. A person sells his dwelling house to another, and receives the price from the purchaser. He also executes and makes over to the purchaser a deed of sale for the same, attested by four witnesses. But the seller did not sign the instrument; the seal of the Cauzee was not affixed, nor was it registered, nor was the date of the month or year inserted. The seller now raises objections to the transaction, and, six months after the execution of the deed, sues the purchaser for rent. Under these circumstances, in virtue of the deed aforesaid, is the transaction valid or not?

Informality in the deed does not vitiate a sale, otherwise complete.

R. The sale is completed by tender and acceptance having passed between the seller and the purchaser. Besides the purchaser paid the price to the seller, and the seller received it, without hesitation. Under these circumstances the objection of the seller can have no weight in law. The seller has nothing to do with a third person claiming the right of pre-emption, who may sue the purchaser.* The deed of sale bearing no date, seal or registry, is undoubtedly informal, but

* In this case the seller pleaded that the sale was void, from the circumstance of his having no power to sell to the purchaser and thereby deprive a third person of his right of pre-emption; but it was held that this plea was unavailing, as between the seller and purchaser.

Vide Case No. II and page 81.

that circumstance does not vitiate the sale itself.* The seller's claim for rent due previously to the sale will hold good.

CASE IX.

Q. A Moosulmaun executes two successive deeds of sale in favour of his wife, and continues in possession of all his property for the space of nine years, subsequent to the execution of such deeds, during which time he did not make out a formal deed of sale with the *Kazee's* attestation, as was promised in the former deeds. Under these circumstances, does the property, of which mention was made in the deeds of sale, belong to his widow, or is it to be taken as the estate of the deceased, and divisible as such among his other heirs?

Uncertainty as to the subject of sale vitiates the contract.

R. It appears from the deeds of sale that the husband sold to his wife, in exchange for the sum of fifteen thousand rupees, of her claim of dower, all the lands and houses specified in the deeds, his household property, every thing that he acquired by inheritance, together with all the property that he might be possessed of up to the day of sale. Now the conditions of this contract are invalid, and it is null and void, because the property sold is not specified, and uncertainty legally vitiates a contract of sale.† The heirs of the seller are therefore at liberty to set aside the contract. The sale would not be necessarily invalid by reason of the deed not having been officially attested by the *Kazee*,‡ nor by the fact of the seller having continued in possession for the period of nine years subsequent to the execution of the deed.§ On the annulment of the sale,

* See Prin. Claims, &c. 3.

† Prin. Sale 13. ‡ Prin. Claims 3. § Prin. Sale 12.

his property, after the satisfaction of his debts, will be distributed among his heirs.

CASE X.

Q. A Moosulmaun disposes of all his property to his wife by a *Beea Mokasa.** In the deed of conveyance there is, among other property, a landed estate, which, before the execution of the deed of *Beea Mokasa*, had been farmed by the proprietor to a stranger, for the term of six years, the proprietor receiving an advance of rent amounting to four thousand five hundred and one rupees. Now under these circumstances, and supposing the purchaser by the *Beea Mokasa* never to have got possession, under that deed, of the estate that was farmed out, is the deed valid or not?

R. Under the circumstances stated, according to Law, the estates, whether one, two or more, that were specified in the deed of *Beea Mokasa*, will pass and be conveyed in virtue of the deed, notwithstanding that the person who executed that deed may have farmed them out for a term of six years, before the execution of the deed; and according to the above contract, the purchaser (that is to say the wife) will be proprietor of the estate. As, in a contract of *Beea Mokasa*, the Law does not require seizin and possession, the deed of *Beea Mokasa* will be legally valid, although the purchaser may be out of possession for several years.†

In a *Beea Mokasa* immediate possession not necessary.

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* *Beea Mokasa* or barter is defined to be the exchange of property for property. It is sale in one shape and purchase in another shape. Neither of these can be absolutely termed a *sale*. See Hamilton's Hidaya, vol. 3, page 31.

† It may be presumed, although not distinctly mentioned in the question or opinion, that this was a case of dower between the husband and wife, the former assigning to the latter an estate in lieu of the dower he had stipulated to pay her. The transaction in this case resembled a *Hiba-bil-Iwuz*, or gift for a consideration. See note to case 18, page 96.

CASE XI.

Q. If a man during his lifetime make a *Bye-bil-wuffa*, or conditional sale to another of his property, for a term of ten years, is the widow of the mortgager, after his death, before the expiration of the term fixed, and without having fulfilled the conditions of the contract, at liberty to make an absolute sale of such property to a third person ?

Of an absolute, with a conditional sale.

R. Such sale is legally valid, but its operation is suspended on the pleasure of the conditional purchaser. He may give it effect if he pleases, but he cannot annul it. It depends also on the pleasure of the absolute purchaser. If he pleases he may wait until the expiration of the term, or he may immediately return, to the conditional purchaser, the money borrowed from him, having recourse, if necessary, to a judicial decision to set aside the conditional sale ; because the effects of a conditional sale and a pledge are legally the same : and if a pawner sell a pledge, without the permission of the pawnee, the sale is valid, but the effect of the sale is suspended on the pleasure of the pawnee. The purchaser also is at liberty to wait until the redemption of the pledge, or to cause its redemption by an appeal to a judicial tribunal. Authority from the *Viqaya,*—" A sale by a pawner of his pledge should be suspended on the pleasure of the pawnee, and the sale takes effect if the pawnee agree, or if the debt be discharged ; in the former of which cases the price is to be deposited in lieu of the pledge sold. According to the correct opinion, the pawnee has no power of cancelling the sale, but the purchaser is at liberty either to wait until the article be redeemed or to cause its redemption by appeal to a judicial tribunal." Also in the *Kholasa* cited from the *Futwas* of *Nujmoodeen Nusfee.* " The rules that apply to a pledge apply equally to a *Bye-bil-wuffa* or conditional sale."

The law of pledges applies to conditional sales.

CASE XII.

Q. A husband, in his last illness, five days before his death, disposed of his property by sale to one of his wives. Is the sale under such circumstances available in Law?

Of a death-bed sale to an heir.

R. The validity of a death-bed sale to one heir depends on the consent of the deceased person's other heirs. If they express their sanction to the sale the contract is legal and binding; otherwise it is null and void, as is laid down in the *Khizanutool Mooftieen*,—"A person being on his death-bed sells a certain part of his estate to one of his heirs; he lives about five days afterwards, and then dies. Subsequently to his death, if his remaining heirs do not give their consent to the sale, it is rendered null and void."*

CASE XIII.

Q. A man being involved in debt, made over by gift to his wife, without satisfying his creditors, all his property, real and personal, without specification, in exchange for her dower, which she remitted in consideration of the gift. The property so given continued in the joint use and occupancy of the donor and donee, who had apparently the same interests therein. The husband is still alive; under these circumstances is the debt of dower due to the wife entitled to satisfaction in preference to the claims of the other creditors, who are strangers?

Specification of the subject is requisite in all contracts of exchange.

R. According to Law, the dower of the wife is a debt, and stands on an equal footing with the just claims of other creditors; either description of debt being entitled to prior

* The reason of this is, that in a death-bed sickness, a man is not supposed to possess the exclusive right over his property, as the claims of the heirs then begin to assume an incohate existence.

satisfaction: and a debtor is at liberty to satisfy one claim in preference to another, or to assign any part of his property in liquidation of the debt of any particular creditor. On this principle it would be lawful for the husband to discharge the debt due on account of his wife's dower, before satisfying the claims of the other creditors who are strangers; and it would also be allowable in him to make a gift of his immoveable property in exchange of the dower, which transaction would be nominally a gift, though virtually a sale. But in this case the amount of the dower due does not appear to have been specified, nor the site and boundaries of the immoveable property. The Law however requires specification in all contracts of exchange; and this being indispensable,* the deed of mutual gift, which is in this case destitute of it, is not valid and binding. Independently of this objection, taking the transaction in the light of a gift, there does not appear to have been, on the part of the donee, such seizin as the Law requires.

CASE XIV.

Q. 1. If a person sell his own property, together with the property of another, by one contract, without defining how much of the price received is opposed to his own, and how much to the other person's property, is such contract, which is unauthorised as far as regards the property of the other person, to be held valid and binding or otherwise?

Rules in case of sale of property not be-

R. 1. The sale of a person's own property, mixed up with that of another, without defining the respective

* This is indispensable because (See Prin. Sale 13) it is requisite that, in all contracts of this nature, such certainty should exist as to preclude the possibility of all future contention as to the meaning of the contracting parties.

prices attached to each, admits of two predicaments. In one case the seller may have disposed of the property of another person together with his own, representing it as entirely belonging to himself. In this case, when the lawful proprietor appears, the purchaser will be entitled to receive back from the seller so much of the price as may be equivalent to that part of the property sold which may be proved to belong to the claimant, and the contract will hold good as far as regards the remainder of the property sold; because an established claim to part does not affect the validity of the whole transaction. The entire purchase is opposed to the entire sale, and the component parts of the price paid to the component parts of the property sold. In the other case, he may have disposed of another person's property together with his own, such property avowedly belonging to another individual, without his consent (though for his benefit,) and without making any distinction as to the price, in which case the sale is unauthorized, and the rule is that its validity is suspended on the consent of the proprietor, who is at liberty either to confirm the sale or to annul it, as far as regards his own property; but to the extent of the seller's share, the contract will be valid and binding against him. longing to the vender.

Q. 2. A person being deeply involved in debt, sells the whole of his property to his wife in exchange for her debt of dower, thereby entirely excluding his creditors from all hope of ever realizing their demands against him. Under these circumstances, is such sale legal and valid?

R. 2. If the individual in question was afflicted with a mortal disease at the time he made the sale of all his property to his wife in lieu of her debt of dower, the sale is inva- Of sales by a debtor made in sickness.

lid; because a person, under such circumstances, is not entitled to make a partial liquidation of his debts, satisfying some creditors at the expense of others. But, if he was in health, and of sound disposing mind at the time of sale, it will be valid, because, notwithstanding the fact of his being deeply involved in debt, he has, under such circumstances, full dominion over his own property.

And in health.

CASE XV.

Q. A woman dies, having transferred her landed property to a stranger by a deed of sale. Ten years after her death, her nephew comes forward and claims the property sold by her, in right of inheritance. It appears from the evidence of two of the witnesses who attested the deed of sale, that the woman, when she executed it, was *non compos mentis.* Under these circumstances, what is the Law?

Sale by a *non compos* person invalid.

R. Sales made by sick persons on their death-beds, and at a time when they are not in full possession of their mental faculties, are invalid according to law; but the heirs and creditors of the seller are not competent to resume the property sold, without returning the price that may have been paid. Until they do so, the property sold will remain as a pledge in the possession of the purchaser.

Proviso in favour of purchaser.

CHAPTER III.

PRECEDENTS OF PRE-EMPTION.

CASE I.

Q. Certain lands are sold, and the person, who claims the right of pre-emption to them, lives at a great distance from the spot, as does his agent. About seven or eight months after the sale, the agent, becoming acquainted with the occurrence, writes to the purchaser, forwarding to him the amount of the purchase money, and he also writes to the seller. By this means another month elapses, at the end of which period he brings his claim into a Court of Justice. Is the claim of pre-emption admissible under the circumstances stated?

R. In this case it appears that the claimant to the right of pre-emption was at a considerable distance, and that his agent was also far removed from the place at which the sale was negotiated; that seven or eight months after the transaction, the agent of the claimant, hearing of the sale of the lands to which the claim of pre-emption is now adduced, wrote letters to the seller and purchaser, and forwarded, to the latter, the amount of the purchase money paid by him, and that one month afterwards he adduced his claim in Court. Such claim is legally admissible, because the affirmation by witness and immediate claim are required to be made on knowledge of the sale, and in this case it appears that the agent made claim immediately on hearing of the transaction, seven or eight months after it occurred; asserting his claim in writing and transmitting the amount of the purchase money. If, in the course of doing so, another month elapsed, the right to pre-emption cannot thereby be annulled. He is

Forms to be observed in claiming pre-emption.

therefore at liberty to bring his claim into a Court of Justice. The legal forms to be observed in asserting the right of pre-emption are immediate claim followed by affirmation by witness, which consists in the party going upon the lands, the right of pre-emption to which he claims, or to the seller or purchaser (whichever of them has possession of the lands), and saying that he is a claimant of pre-emption, that he has already asserted his claim, and that he continues to do so; at the same time calling witnesses to the fact of his making the claim. He may also depute an agent, provided he is at a considerable distance and cannot afford personal attendance; and, if unable to depute an agent, he may communicate with the seller or purchaser by letter; and if unable to do either, his right of pre-emption still remains, and he may bring it forward whenever he has it in his power to attend for the purpose. If, on immediate claim and affirmation by witness being made, the purchaser or seller deliver up the lands to the claimant, there will be no occasion for applying to a Court of Justice; but if they decline doing so, they should be proceeded against within the period of one month. If the claimant neglect to sue for his right within that period, his claim is inadmissible, according to *Imam Moohummud.** The tenets of some modern authorities are in conformity with this opinion, and the commentator on the *Viqaya* has adopted it. But, according to *Aboo Haneefa*, there is no limitation of time for bringing the claim into a Court of Justice, and it is admissible if brought forward in any moderate period though exceeding one month. Such doctrine is conformable to the opinion held by the more ancient authorities, and the author of the *Hidaya* has followed it. In the case in question, however, the right is not affected even according to the doctrine of *Imam Moohummud*, because the month elapsed while the claimant was in progress of urging

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* Vide App. Tit. Pre. 26, 27, 28.

his immediate claim. His claim, consequently, is legally admissible, though preferred after the expiration of one month. The following are the authorities for the above doctrine: *Shur-hi Viqaya,*—"A person should assert his claim of pre-emption in the assembly (before it breaks up) where he hears of the sale, using language that is unambiguous, such as "I have claimed pre-emption, or the like, or I am a claimer of pre-emption, or I claim it." According to *Koorkhee,* the liberty to claim the right of pre-emption remains until the assembly breaks up; but according to other Doctors the right is lost, if silence be observed, even for a short time after the receipt of the intelligence of the sale. Such is the meaning of the term *tulb-i-mowasibut* or immediate claim, which is so called, to show the necessity of extreme despatch. He should next call persons to witness on the premises, or else in the persence of him (whether seller or purchaser) who has possession of them, and should say—"such an one has purchased this property and I have a right of pre-emption, to which I have laid claim and I still claim it. Bear witness therefore to the fact." This is the mode of affirmation by witness. It should be remembered, however, that this form must be gone through, in all possible cases, either on the premises or in the presence of the party in possession, insomuch that if the claimant has it in his power to do so, and neglect to act accordingly his right to pre-emption is rendered null and void, according to the *Zukheera.* If a person, having a right to pre-emption, be on a pligrimage to *Mecca,* and make the immediate claim, but be incapacitated from making the affirmation by witness, either on the premises or in the presence of the party in possession, he should depute an agent to do so if he can find one, and if not, he should send a messenger or a letter; but if unable to do this even, his right of pre-emption nevertheless

Of the immediate claim.

Of the affirmation by witness.

remains, and he may claim it whenever he attends ; but if he wilfully neglect to conform to what is above required, his claim of pre-emption is rendered null and void : afterwards he should bring his claim into a Court of Justice and should declare to the following effect :—" Such a person has purchased such a property and I have a right to pre-emption in consequence of my property being situated in such a place—I therefore claim possession." This is called the claim of possession and litigation. The right of pre-emption is not affected by delay in preferring this claim, although according to *Moohummud* it is forfeited by the delay of one month, and this doctrine has been occasionally followed. But according to the *Hidâya*, —" If the person having the right of pre-emption delay making claim by litigation, still his right does not drop according to *Haneefa*. Such also is the generally received opinion, and decrees pass accordingly. There is likewise one opinion recorded from *Aboo Yoosuf* to the same effect. *Moohummud* maintains that if the person, having the right, postpone the litigation for one month after the taking of evidence, his right drops. This is also the opinion of *Ziffer*, and it is related as an opinion of *Aboo Yoosuf*, that his right becomes null if he delay the litigation after the *Kazee* has held one Court; for if he wilfully, and without alleging any excuse, omit to commence the litigation at the first Court held by the *Kazee*, it is a presumptive proof of his having declined it. The reasoning on which *Moohummud* founds his opinion in this particular, is that, if his right was never to be invalidated by his delaying the litigation, it would be very vexatious to the buyer ; for he would be prevented from enjoying his property in the apprehension of being deprived of it by the claim of the person possessing the right of pre-emption. "I have therefore, says *Moohummud*, limited the delay that may

Of the claim by litigation

be admitted, to one month, as being the longest allowed term of procrastination." In support of the opinion of *Haneefa* it is urged that, his right being firmly established by the taking of evidence, it cannot be defeated but by his own renunciation openly declared; in the same manner as holds in all other matters of right. With respect to what is mentioned by *Moohummud* that the delay would be vexatious to the buyer, it is of no weight; for, in case of the absence of the person having a claim to pre-emption, his right is not invalidated by the litigation being delayed; and the vexation sustained by the buyer from the delay is equally the same, whether the claimant be present or absent. If it appear that the *Kazee* was not in the city and that on that account the litigation was delayed, the right is not invalidated according to the concurrent opinion of the three above-mentioned sages; for the litigation can only be made in the presence of the *Kazee*, and the delay is therefore excused. A *Moosulmaun* and a *Zimmee*, being equally affected by the principles on which pre-emption is established, and equally concerned in its operations, are therefore on an equal footing in all cases regarding the privilege of it, and for the same reason a man, or a woman, a reprobate, a free-man, or a slave, (being either a *Mokatib* or a *Mazoon*) are all equal with respect to pre-emption."*

CASE II.

Q. Shuhamut Ali was joint proprietor with the plaintiffs of an ancestral estate. The share of each proprietor was defined, and they paid their rents to Government separately on their several portions. In the month of *Bhadoon*, Shuhamut Ali sold a part of his share of the estate to Munee Ram, a Hindoo, who was an entire stranger to the family. Who may be claimants.

* See Prin. Shoofaa 4, 8.

Towards the end of the month of *Assin*, the plaintiffs obtained intelligence of this transaction, and about the 15th of the month of *Kartick*, or nearly a month from the date of their obtaining the intelligence, they preferred their claim to the right of pre-emption ; but they have failed to prove, that, at the proper period, that is, on their being apprized of the sale, they had recourse to affirmation by witness, and that they preferred an immediate claim to the seller and purchaser. Under these circumstances therefore, is their title to pre-emption good and valid, without proof of their having made the affirmation by witness, and immediate claim ?

The right of pre-emption how defeated.

R. The right to pre-emption is not established according to Law, unless there be affirmation by witness, and immediate claim. According to the *Viqaya*,—" It is established by affirmation before witnesses," and the right to pre-emption is annulled by the omission to make immediate claim, and affirmation by witness. According to an extract from the *Mokhtar-ool Futawa*, contained in the *Madun*,—" It is annulled by the omission to make immediate claim." It is also stated in the *Shurhi Viqaya*,—" Know that it is requisite to make this claim, by calling to witness at the place where the property is situated, if possible, or in the presence of the possessor thereof; insomuch that, if this be possible, and the claim be not made accordingly, the right of pre-emption is annulled."

CASE III.

R. Does the law fix any specific period within which it is necessary to prosecute a claim of pre-emption ; and if so, what is the period? and if a person ten months after the execution of the deed of sale, duly sealed and attested, and after the purchase money has been paid

by the purchaser to the seller, prefer his claim to the property sold in virtue of his right of pre-emption, is such claim admissible; it being stated by the claimant that the property sold is in his possession as farmer; that after the sale, the purchaser sued the seller for the proprietary right, and that, for the purpose of procuring the registry of his (the purchaser's) name as owner, this suit was amicably adjusted between the parties, after which the circumstances of the sale were known to him; that, admitting his previous knowledge of the sale, this fact is a matter of no consequence, the deed of sale not being complete and binding until its authenticity had been legally proved, and that he had brought forward his claim within the period of one month from the date of the decision of the suit instituted by the purchaser. Under these circumstances, should the period be reckoned from the date of the deed of sale executed in favour of the purchaser, or from the date of the adjustment of the suit instituted by him?

Case of a claimant by pre-emption who, though aware of the sale, omits to come forward, until after formal adjudication of the purchaser's right.

R. The right to pre-emption cannot exist without proof of the *Tulub-i-mowasibut* or immediate claim. For this there is no specific period assigned, but all authorities agree in declaring the necessity of its being made by the person claiming the right to pre-emption on the instant of his becoming acquainted with the sale, without the least delay. This is absolutely requisite, so much so, that if any delay occur, the claim of pre-emption is void; for it is a claim which naturally rests upon a weak foundation. After the immediate claim and affirmation by witness, comes the claim by litigation, which signifies the preference of the claim to a Court of Justice. This is limited and confined according to one doctrine to the period of one month* from the date of

* It has been ruled, however, agreeably to the majority of legal opinions, that no length of time having elapsed previously to the claim of litigation, can render

the immediate claim, in the absence of any insurmountable obstacle. It appears in this case that the person claiming the right to pre-emption was aware of the sale previously to the amicable adjustment of the suit instituted by the purchaser, at which time it does not appear that he made the immediate claim, following it up by a claim of litigation. On the contrary, it appears that he declined doing so. His claim therefore is inadmissible. The statement of the claimant as to his having become acquainted with the circumstances of the sale, after the amicable adjustment of the suit is of no avail to his claim; this being in fact a second information which cannot legally be attended to, the first information being that contemplated by the Law. His pleas therefore as to this particular are inadmissible.

CASE IV.

Q. Certain lands were possessed jointly by a Hindoo and a Moosulmaun. The heirs of the latter sell a portion of such joint property to another Hindoo, who is a stranger to the parties. The Hindoo partner, at the time of sale, objects to the transaction, and offers a price exceeding that paid by the purchaser, claiming, in due form, his right of pre-emption. Will his claim of pre-emption to the lands so sold hold good; or must the purchase of the stranger be upheld as valid?

A Hindoo has the right of pre-emption even against a Moosulmaun seller.

R. Under these circumstances, as the claimant is a partner, whose property is intermixed with that which has been sold, and as the purchaser is a stranger, the act of the heirs of the Moosulmaun must be considered illegal, and injurious towards the Hindoo partner, who objected and claimed his right of pre-emption in

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null the claim itself; because the right is absolute and indefeasible after the immediate claim, and the claim by witness have been made. See Prin. Shoofaa 8, note.

due form. His claim of pre-emption therefore must be recognized, and the sale to the stranger must be set aside.*

CASE V.

Q. Three persons institute a suit against the seller and the purchaser of certain lands, claiming the right of *Shoofaa* or pre-emption. A decree was passed, reciting that the defendants should receive the sum of eighty sicca rupees, being the price of the lands in dispute, from the plaintiffs, and surrender the lands into their possession; but the plaintiffs did not pay the price, as ordered, nor did they take possession of the lands by obtaining the execution of the decree. One of the plaintiffs and one of the defendants having died in the interval, the surviving plaintiffs after the lapse of eleven years, eleven months and sixteen days, from the date of the decree, pray for permission to deposit the price of the lands in question, and to be put into possession thereof. Under these circumstances, are the plaintiffs entitled to enforce their right of pre-emption founded on the judgment originally pronounced in their favour?

R. According to law, the claim to the right of pre-emption holds good, and the order of the Judge decreeing the privilege thereof is available, even if the *Shafee* or person to whom the right of pre-emption appertains, should omit to produce the price of the lands in dispute at the time of the institution of the suit, but it is incumbent on him to produce the price when the Judge passes a decree in his favour. It is declared in the *Hidaya*,—" The *Shafee* may litigate his

Former judgment how rendered unavailable in a claim of pre-emption.

* See the remarks on claims of pre-emption by Hindoos in the Preface to this work.

claim of *Shoofaa,* although he do not produce in Court the price of the ground in dispute ; but when the *Kazee* has decreed to him the privilege of *Shoofaa* it is necessary that he bring the price." According to the above doctrine, if the decree was passed for the immediate deposit of the value of the lands and for the delivery of them into the possession of the plaintiffs, the claim of pre-emption is defeated on account of the delay which occurred in making payment of the price. So also if the price be adjudged payable at a certain time, or the usual period (being one month) be allowed for the payment, and payment be not made before the expiration of such period, the right of pre-emption will be annulled, as is laid down in the *Futawa-i-Nukshbundee,*—" If a person purchase a house for a stipulated price in ready money, the *Kazee* will not pass a decree in favour of a claimant to the privilege of pre-emption, until such claimant produce the price or appoint a determinate period for its payment, to which, if he conform, his claim holds good ; otherwise not." In this case, agreeable to both the above doctrines, the claim of pre-emption is legally null and void, on account of the delay which occurred in the payment of the price.

CASE VI.

Q. A person sells his landed property to his father or his brother. According to law, does such sale to a relation exclude a stranger from claiming the right of pre-emption ?

Claim of pre-emption against the seller's relative.

R. In a legal point of view the claim of a stranger, having the right of pre-emption, is not defeated by the circumstance of the purchaser being a relative of the seller, relation not being considered any ground whereon to found a claim to pre-emption.

CASE VII.

Q. A dispute arising between the person who has the right to pre-emption of certain lands, and the seller and the purchaser of those lands, the former contending that the price paid by the purchaser amounted to two hundred rupees only, and the two latter maintaining that the price paid was eight hundred rupees, the evidence on both sides being so equal as to form no ground for a determination, and it being urged by the former, that, in the event of a dispute in such matters, the Law declares, that the selling and purchasing parties should be put to their oaths, it is required to be stated, whether or not, according to the provisions of the Moohummudan Law, it is incumbent on the seller and purchaser above-mentioned to verify by oath their respective allegations?

Rules where the claimant by pre-emption and purchaser differ regarding the price.

R. According to Law, if the person who has the right to pre-emption, and the purchaser, differ in their allegations respecting the amount of the price paid, an oath is incumbent on the purchaser alone. If they both produce evidence, that of the person having the right to pre-emption, is preferable. These opinions are delivered in conformity to the doctrine laid down in the *Hidaya*. If the purchaser and *Shafee*, that is, the person having the right to pre-emption, differ regarding the price, the assertion of the purchaser must be credited, because here the *Shafee* claims the right to the property at a smaller price, which the purchaser denies; and according to Law, the declaration of a defendant on oath must be credited. They must not both be sworn, because the *Shafee* is plaintiff against the purchaser, but the purchaser is not plaintiff against the *Shafee*, he being at liberty either to claim or resign the property in question, and they cannot both be called upon to swear. If they both produce

evidence, that produced by the *Shafee* must be credited according to *Haneefa* and *Moohummud*.*

CASE VIII.

Q. 1. A certain parcel of land has been sold, which is bounded, on the one side, by a Hindoo Temple, and, on the other, by the property of a private individual. The Superintendent of the Temple and the private individual both claim the right of pre-emption. Under these circumstances which of the two parties should be considered as possessing the superior claim?

Several claimants to pre-emption.

R. 1. Under the circumstances stated, neither party is entitled to preference, and their claims of pre-emption deserve equal consideration. After they shall both have contributed in equal proportions to pay the value of the property, they are each entitled to one-half; according to the *Hidaya*,—"Where there is a plurality of persons entitled to the privilege of *Shoofaa*, the right of all is equal, and no regard is paid to the extent of their several properties." So also in the same authority,—"A Moosulmaun and a Zimmee being equally affected by the principles on which *Shoofaa* is established and equally concerned in its operations, are therefore on an equal footing in all cases regarding the privilege of *Shoofaa*; and for the same reason a man or a woman, an infant or an adult, a just man or a reprobate, a freeman or a slave (being either a Mokatib or Mazoon) are all equal with respect to *Shoofaa*."

* See Prin. Shoofaa 12. Aboo Yoosuf is of a contrary opinion, and maintains that the evidence of the purchaser is entitled to a preference in credit; but his arguments have been satisfactorily refuted in the Hidaya. Vide Hamilton's translation, page 578, vol. 3. And the exposition of the Law in this case seems conformable to the general doctrine of evidence that the oath of the defendant, and the evidence of the plaintiff are severally entitled to preference. See Prin. Claims and Judicial Matters, 25 and 29.

Q. 2. Supposing the property to which the right of pre-emption is claimed to be under litigation, will this circumstance invalidate the claim?

R. 2. A claim of pre-emption preferred by a person having the proprietary right of vicinage, is under all circumstances valid, and cannot be defeated by the fact of the property claimed being under litigation. Case of claim to property under litigation.

CASE IX.

Q. 1. A person makes a *Bye-bil-wuffa* or conditional sale to another of his *Aymah* (rent-free) ground, with the trees which were planted thereon, for a term of ten years. The conditional purchaser is put into *bonâ fide* possession of the land, and, after some years, the conditional vender makes an absolute sale of it to a third person, to satisfy the debt due to the conditional purchaser. Under these circumstances is the right of *Shoofaa* or pre-emption, claimed by the proprietor of the village in which the *Aymah* land is situated, and who received *Malikanah* or a proprietary tithe of its produce, admissible or not?

R. 1. If a Moohummudan ruler obtain a territory by conquest, he is at liberty either to reinstate the original possessors of the lands, taking rents from them; or to transfer them to the possession of some other natives of the country on the same terms, or to distribute them among the soldiers of his army and to fix a tenth of their annual produce to be levied from them. From this it follows that, at the first period of conquest, the lands belong to the *Bytoolmal* or public treasury. The ruler is at liberty, from the time of his accession, to bring the produce of the lands into the public treasury, not conferring on individuals the proprietary right to any part of them, but to let them out in farm. In the same

manner the ruling power has authority to farm those lands which have escheated to him by the death of the ancient proprietors leaving no heirs. The author of the *Buhroorayiq* relating the doctrine of *Sheikh-ibn Homam*, on the subject of lands situated within a city, has the following passage:—"Lands situated within a city are not subject to the payment of land rent; but a tax is levied on them of the nature of house rent, owing to there being no person therein from whom the payment of land rent is due." It appears also to be the case, with regard to Hindoostan, that a great part of the territory has come into the possession of the ruling power by conquest, and that many of the lands appertaining thereto have since become the property of the State, or having been left in the possession of the former proprietors, have, in process of time, been resumed by reason of the death of the incumbents leaving no heirs. There is a certain description of persons called *Mooquddims* or chiefs of villages, and head farmers, who are considered as proprietors: and derive a tithe from the lands which is termed *Nankar* or *Malikana* or the proprietary share of the produce. And as the ruling power is at liberty to relinquish his claim of revenue whenever it may be deemed fit, so also he is at liberty to make over by gift the lands which are the property of the State to any person, who may be considered deserving to hold them as a rent-free tenure. Contrary opinions have been entertained by learned men on the subject of royal grants, as to whether they are the property of the donee or not, but the difference of opinion originates in reasons which it is needless to enumerate in this place. The fact is, that the donee has just so much right as may have been transferred to him, whether it consist in a mere exemption from the payment of rent, or the actual proprietary possession of the lands, formerly appertaining to the

The sale of an *Aymah* tenure is admissible according to the Moohummudan Law and the *Zemindar* within whose estate it is situated has the right to pre-emption.

state. It is laid down in the *Mooheet*,—"Property obtained by gift in perpetuity is considered in the light of an absolute estate." It is stated also in the *Mookhtusur-ool Mooheet* —"A person put the following question to *Aboo Huneefa*:—If a king make a gift of property belonging to the public treasury, to a person considered deserving of it, will the property so given belong absolutely to the donee? He said in reply that the donee would be entitled to enjoy it as his own exclusively. The same person put a second question,—If the donee die, leaving heirs, and after his death the ruling power make a gift of the same property to a third person, is the second gift valid or not? *Aboo Huneefa* said in reply that the second gift would be null and void." The true interpretation of the above doctrine is to confine it to corporeal property, capable of actual seizin; and not to extend it to property of an incorporeal nature, or fluctuating property, such as the receipt of rents. The rulers of *Hindoostan*, when they made gifts of lands, executed *Furmans* or mandates, in which they directed their officers in the interior to measure the ground, to define the boundaries, and to deliver them in full possession to the donees; but they did not simply give them an assignment of the produce. Accordingly they (the officers) measured the lands situated in the estates of the proprietors, and defining their boundaries, delivered them to the donees, with the consent of the proprietors, deducting the rent of the lands so separated from the settlement made with the proprietors. According to the question it is understood, that the claim of pre-emption made by the *Zemindar* in this case is founded on the supposition that the *Aymahdar* is absolute proprietor and (as is common in the part of the country in which this question originated) that he is at liberty to sell or farm the lands as he pleases. Under these circumstances the claim of pre-emption made by the

Zemindar in whose estate the lands are situated is legal and valid, by reason of the vicinity and junction of both estates.

Q. 2. The *Shafee* or person who has a right to pre-emption declines to purchase the land at the price demanded by the proprietor, and states that he will not pay for it more than a certain sum. Afterwards the proprietor sells the land to a third person, on receiving his own price. In this case is the *Shafee* at liberty to bring forward a subsequent claim founded on his right of pre-emption?

Refusal to pay the amount demanded by the seller, previous to the sale, does not defeat the right of pre-emption.

R. 2. The claim of the *Shafee* to the right of pre-emption cannot be adduced until after the land has been actually sold to another person, and, from the question, it appears that the *Shafee*, before the sale took place, and consequently before he was entitled to set up any claim to pre-emption, declined to purchase the land, stating that he would not pay more than a certain price for it. Now, as this happened before the sale, and, consequently, before he had any right of pre-emption, his former refusal cannot operate to defeat his claim of pre-emption subsequently preferred; but if, after the sale, he wanted to purchase the ground at the same price which he first offered, and refused to pay the amount which had been agreed upon between the seller and purchaser, such refusal clearly amounts to a renunciation of the right of pre-emption.*

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* The above question originated in a suit instituted in the *Zillah* Court of *Shahabad*, the Law Officer of which Court gave it as his opinion, that the *Zemindar* was not entitled to pre-emption, assigning as his reason for this opinion, that the *Aymah* or rent free lands situated within his estate did not form a fit subject of sale, inasmuch as the *Aymahdar* was proprietor only of the Government share, which had been relinquished to him by the ruling power, after deducting the tenth part as the proprietary share; and that therefore he had no right to dispose of the absolute property in the lands, but only of so much of the produce as belonged to him, which did not form a subject on which pre-emption

CHAPTER IV.

PRECEDENTS OF GIFTS.

CASE I.

Q. A person dies, leaving three heirs, and during his lifetime he executed a deed of gift, conveying to one of them his entire property to the exclusion of the rest. Is such act allowable; and if allowable, is it requisite that the signature of the two other heirs should be affixed to the deed, and is such testimony indispensable to its validity?

R. It is allowable for a person to make over all his property by gift to one of his heirs, if, at the time of making that gift, the donor was in a state of health and sound disposing mind; and, even though at the time he was sick, the Of gifts made in health and in sickness.

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could be founded. The question having been subsequently referred to the *Patna Provincial Court*, an opinion in opposition to that of the *Shahabad* Law Officer was recorded, which induced a reference to the *Sudder Dewanee Adawlut*. In the reply to the first question, the Law Officers have entered into a disquisition at some length with the view of refuting the opinion that all Royal Grants are necessarily limited in their nature, and of showing that, in some instances, an absolute proprietary right is conferred. This principle seems to be recognized in the regulations of Government, and there is no doubt but that persons possessing Royal Grants, confirmed by competent authority, since the Company's accession to the *Dewanee*, as hereditary rent-free tenures, have the same right to dispose of them as other proprietors have, who pay Government Revenue on their estates. The difference of opinion in the present case seems to have originated in the *Aymahdars* having been considered, on the one hand, as proprietors of so much only of the produce of the estate as would have been the share of Government, had the estate been subjected to the payment of revenue, the proprietary right to the remainder continuing vested in the original proprietor; while, on the other hand, they were considered as having an absolute proprietary right over the whole rent-free tenure, the original proprietor receiving a commutation equal to a tenth part of the produce of the property of which he had been divested, and to which tenth part he would still continue to be entitled into whatever hands the estate passed. The latter opinion seems most consonant to reason and practice. Had the former opinion been held to be the more authentic one, the right of pre-emption would not attach in the case, as then the profits only would have been the subject of sale, and (agreeably to Prin. Shoofaa 8) the right of pre-emption does not apply to moveable property.

Vide App. Tit. Pre. 24.

gift is valid, provided he subsequently recover from the sickness. But if he died in consequence of such sickness, the disposition holds good to the extent of a third only, of the donor's property; that is to say, the donee will be entitled to one-third only, and the remaining two-thirds will be distributed among the other heirs.* According to the *Hidaya*,—"It is to be observed as a general rule that where a person performs with his property any gratuitous deed of immediate operation (that is not restricted to his death), if he be in health at the time, such deed is valid to the extent of all his property; or if he be sick, it takes effect to the extent of one-third of his property. It is also to be remarked, that a sickness of which a person afterwards recovers, is considered in Law, as health, because upon his recovery it is evident that no one else has any right to his property." The testimony of the other heirs is not necessary to the validity of the deed. It is good to all intents and purposes without their evidence, and its authenticity may be established by the depositions of witnesses who are strangers; besides in no contract is the evidence of witnesses a necessary condition, except in that of marriage. It is merely resorted to for purposes of judicial proof, should it be required.

Witnesses indispensable to no contract but marriage.

CASE II.

Q. A person makes a formal gift to his wife of a twelve anna share of his landed property, and she, having become seized and possessed thereof, afterwards makes a verbal gift of the whole of it to the wife of her grand-son. Is such gift made *ore tenus* valid according to Law? And, in virtue of it, can the grand-son's wife take the property so conveyed?

* But the donee, being an heir, will not be entitled to one-third even, unless the other heirs consent, see Prin. Gifts 11.

R. Under these circumstances, if the donor separated the landed property disposed of by gift, and put his wife into complete possession and enjoyment thereof, the gift will be good and valid according to Law. Again, if the donee make a verbal gift of the property which she had so acquired, to her grand-son's wife, and put her into possession, such gift must also be upheld as good and valid, provided it be established by the evidence of two men, or one man and two women.* A verbal gift of land is valid.

CASE III.

Q. Is a gift, whether with or without a consideration, or sale of property not distinctly defined and separated from other property, valid or otherwise?

R. The gift, whether with or without a consideration, of undefined property, provided it admit of being rendered distinct and separate, is invalid; but the sale of such property is allowable, and holds good as far as the right and title of the seller is concerned: but it cannot affect the interests of parties not privy to the contract.† Of undefined gifts and sales.

CASE IV.

Q. 1. A Moosulmaun dies, leaving three wives. By the first wife he had a son and a daughter; by the second wife he had a daughter, and by the third wife a daughter. Before his death he executed a deed of gift of all his property to his three wives, but he had not divided it, or put them into possession. In this case, is the deed above-mentioned valid or not; and under that deed of gift can the heirs of the widows take possession?

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* See Prin. Claims 2.

† Vide Appendix Tit. Deed, 7, wherein a case is reported in which a gift was held invalid because the consideration was undefined and unknown.—Ed.

An undivided gift to three persons, of which they did not obtain possession during the donor's life-time, invalid.

R. 1. The deed of gift is not valid : the heirs of the donor, whoever they may be, inherit his property.*

Q. 2. If any one of the widows, or their heirs, should dispose of a portion of the land which belonged to their deceased husband, by gift or sale, would such sale or gift be valid to any extent ?

A gift of more than the owner's right is void, but a sale is valid to the extent of the right.

R. 2. The gift by any of those persons would be invalid ; but it is allowable for any of them to sell their own shares, so much as they may legally succeed to by inheritance. They cannot however sell defined portions (by land measurement), of their shares.†

CASE V.

Q. A woman executes a deed of gift in favour of two persons, transferring to them her right and title to her entire property, real and personal. She also granted them permission to make a division of the property so given between themselves ; and they accordingly divided the property two or three months after the date of the gift. Is such a proceeding valid, according to law ; or was it essential to the validity of the deed of gift, that the division should have taken place simultaneously with the transfer ?

* This transaction must have been held to be invalid according to the Moosulmaun Law, whether viewed in the light of a bequest or of a gift. In the former case it would have been contrary to the Law, which prohibits a Moosulmaun from bequeathing more than a third of his property and, in the latter case, seizin is requisite.

† The reason for this opinion is that, to render gift valid, seizin is requisite ; but, as the widows' shares are unascertained, there cannot be seizin of what in itself is unknown and undefined. A sale, on the other hand, is allowed, because it is not necessary to the validity of such contract, that present seizin should take place. Possession may take place after the share sold has been defined and ascertained by partition. In fact it is a sale of the seller's right and title, whatever that may prove to be ; but sale specifying the extent of interest by land measurement, when the extent is unknown and undefined, is preposterous and illegal.

R. The law requires that any thing which is capable of division, when given to two persons, should be divided by the donor, at the time of the gift, or immediately subsequent to the transfer and prior to the delivery to the donees, in order that the objection of confusion* may be avoided and full and complete seizin obtained, which is essential to the validity of a gift. It appears, in this case, that the property given was divided by the donees with the consent of the donor, two or three months subsequent to the date of the deed of transfer. Such a proceeding is not legal. To render it valid, it was essential that the delivery and the division should have been simultaneous.† In a gift of partible property to two persons, division is essential prior to delivery.

CASE VI.

Q. A person executed a deed of gift in favor of his nephew, conferring upon him the proprietary right to certain lands, of which he (the donor) was not in possession, but to recover which he had brought an action, then pending, against his wife. By the same deed he made over to him certain other landed property of which he was possessed. About a month after executing the deed, the donor died, and the donee, in virtue of the gift, lays claim to the litigated

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* The word in the original شياع strictly signifies indefiniteness. I have here however rendered it by the term "confusion" as more expressive of the signification intended to be conveyed.

† The Law Officer of the *Zillah* Court of *Shahabad* being consulted as to this question, maintained that the proceeding was valid, and the authority for making the division granted by the widow was sufficient to legalise the gift, although such division took place two or three months subsequently to the transfer, and was carried into effect by the donees. Other Law Officers and ultimately those attached to the Court of *Sudder Dewanee Adawlut*, however, having been consulted, the doctrine here laid down was ascertained to be correct. As I have before had occasion to notice an instance in which the opinion of the *Shahabad Mooftee* (*Moulovee Syud Ahmudee*) was overruled, I think it but an act of justice to that individual to state, that from personal knowledge of his character, I believe him to be a very respectable and learned man.

property. Under these circumstances is his claim, under the deed, allowable?

Any gift not in donor's possession during his lifetime is null and void.

R. The gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed containing such gift is of no effect, because, in cases of gift, seizin is a condition. Gift is rendered valid by tender, acceptance and seizin; but in gift, seizin is necessary and absolutely indispensable to the establishment of proprietary right. According to the *Hidaya,*—"Gifts are rendered valid by tender, acceptance and seizin. The Prophet has said, a gift is not valid without seizin. So also if the thing given be pawned to or usurped by a stranger." So also in the *Shurhi Viqaya,*—"A gift is perfected by complete seizin." As the gift, therefore, is null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed. But, with respect to the other lands conveyed at the same time, the donee is entitled to them, if the donor put him into possession. If however the donor died, without conferring possession, the claim of the donee to them also is inadmissible.*

CASE VII.

Q. A person gives an undefined part of lands, belonging to a certain village, to the sons of his daughter. He afterwards makes a gift of the whole of the lands belonging to the village, together with all his other property (his son having died before him) to the son of his son. But there were others who had a right of partnership in the property so

* The reason of the rule is, that seizin and delivery cannot be effected, when the thing is not in the possession of the donor. It is of no consequence how the possession has been parted with, even though the proprietary right be expressly retained, or claimed, as in the case of a pledge or of an usurpation; but if, after the donor recover it, he put the donee in possession, it is sufficient.

Note to Case VI.—Vide Case X. In this the donor died before the donee's suit—in that the donors were living apparently when the donee sued. Vide Case XIV.—Ed.

Vide Appendix Tit. Contract 1. Wherein a case is reported upholding this doctrine.—Ed.

alienated by him. He had two daughters living at the time he made the gift, and he retained the property during his lifetime, the donee being excluded from possession. According to Law, is such gift valid or otherwise?

R. Under the circumstances stated, the first gift to the sons of his daughter is null and void, from the circumstance of its being indefinite, and of its having been retracted.* The second gift likewise to the son of his son of all the lands, together with all his other property, is null and void, from the circumstance of the donor's not possessing exclusive right, of his having retained possession of the property during his lifetime, and of the donee's being excluded from possession. Such gifts possess not the requisite conditions of validity. Gifts are invalid under what circumstances.

CASE VIII.

Q. A person died, leaving two sons and a widow. The elder son, during his lifetime, continued in possession of the estate of his deceased father, providing for the maintenance of his mother and younger brother. The elder son died, leaving, besides his mother and younger brother above-mentioned, a widow and a daughter. After his death, his widow, his daughter and his brother entered into an agreement that ten out of sixteen shares of the landed property should belong to his brother and his mother, and that the remaining six shares should belong to his widow and his daughter. The agreement was drawn up and duly attested by all

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* Although agreeably to Prin. Gifts 13, a gift to a relation cannot generally be resumed, yet there is a special exemption made in the case of a donation from a father to a son or grand-son, the resumption of which is declared to be allowable.

NOTE.—It will be noticed that the author does not mention the authority permitting the retraction of a gift made to a son or grand-son. Vide Case XIV.—ED.

the persons above-mentioned, except the mother of the deceased, and it does not appear whether she was or was not a party. The parties separately enjoyed the profits of their respective allotments, although no partition of the lands took place. Some time afterwards the brother made an assignment, in the nature of a gift, to a stranger, of the profits of two out of his ten anna share. Is such assignment good after his death, supposing him never to have put the donee into possession during his lifetime, and is it good, supposing that he had put him into possession? In either case, was the mother also competent to dispossess the donee, and how would the case be, if the mother herself, previously to the agreement above alluded to, had made an absolute gift of all her husband's property to the donee in question?

R. It appears from all the circumstances connected with this case, that the gift in question is invalid, and that it is, after the death of the donor, absolutely null and void; and the property so transferred will revert to the heirs of the donor, because it is evident that the produce only was transferred, the ground itself being the common property of all the heirs, it not having undergone division; and according to Law, the gift of unrealized produce without the land is wholly invalid. It is immaterial whether the donee was or was not put into possession of the produce of the common lands; for, in both cases, the gift is invalid, an undefined seizin not being held to constitute legal seizin. Under these circumstances, either the mother, or any other heir of the donor is at liberty to dispossess the donee. The mother was not competent to make over by gift to the donee all the property belonging to her husband, because the estate of her husband was the joint property of all the heirs. A gift even of her own portion is invalid, that be-

ing undefined and not admitting of legal seizin ; so that in every view of the case, the gift is entirely null and void. *Shurhi Viqaya,*—" The gift of milk in the udder, of wool upon the back of a goat, of grain or trees upon the ground, or of fruit upon trees, is in the nature of the gift of an undefined part of a thing ; and such gifts are prohibited unless separated from the property of the donor, and seizin be subsequently made of them." But, as, in this case, the trees were not cut down, and the donee did not make regular seizin during the lifetime of the donor, the heir of such donee is not competent to come in and to establish the validity of the donation by the performance of any act on his own part ; because he is quite a stranger to the transaction. The acceptance was not expressed by the heir, but by the ancestor, who died before separation and seizin. In the *Hidaya,* in the chapter treating of retraction of gifts it is stated,—" If the donor should die, his heirs are strangers with respect to the contract, since they made no tender of the thing given. It appearing therefore that the property was not separated and delivered into the possession of the donee, the right was not transferred from the donor during his lifetime, and after his death it devolves on his heirs. It is laid down also in the *Hidaya,*—" Seizin in cases of gift is expressly ordained, and consequently a complete seizin is a necessary condition, but a complete seizin is impracticable with respect to an indefinite part of *divisible* things, as it is impossible, in such, to make seizin of the thing given without its conjunction with some thing that is not given, and that is a defective seizin." So also in the *Viqaya,*—" Gift is perfected by complete seizin." And in the *Shurhi Viqaya,*—" A gift of part of a thing which is capable of division is not valid unless such part be divided off, so that seizin may be definite and not include any thing else." It is evident therefore that

The gift of trees growing on the land of the donor, or of their unrealized produce is invalid without the gift of the land.

a seizin of undefined property is itself indefinite, and cannot be considered valid.*

CASE IX.

Q. The father of an infant child (who is her legal guardian) residing at a distance of three stages from her, the mother of such infant makes a gift to her of certain property. On account of the extreme tender age of the donee, acceptance of the gift did not take place on her part, and, by reason of her minority, the mother, that is to say the donor, with whom the infant was residing, remained in possession of the property given, after the gift had been made. Under these circumstances is such gift, seizin of which had not been made by the donee, valid and binding or otherwise?

Case of gift to a minor donee, the legal guardian being absent.

R. If a mother make a gift to her infant daughter, who is residing with her, of property which is distinctly her own; if, by reason of the minority of the daughter, acceptance did not take place on her part, and the property, from the same cause, continued in the possession of the donor, and if the father was, at the time of the gift, at a remote distance, the gift is legally valid and binding. The seizin of the mother will, under such circumstances, be equivalent to that of her daughter, and, on her signifying her consent, the gift is complete without the donee's seizin. This doctrine is maintained in the *Hidaya* and various other legal authorities. In the *Jouhura Nyura*, in the chapter treating of marriage,

* The principle of the Law in this case is that, in the instance of trees growing on the land and not cut down, they are mixed with the land itself, which is other property, and which formed no part of the gift, and consequently, that seizin of the gift cannot take effect without including in the seizin something which formed no part of the gift. The same objections apply to the gift of unrealized produce, independently of which, the gift of any thing to be produced *in futuro* is null and void, even though the means of its production be in the possession of the donee. (See Prin. Gifts 5 and 6).

questions are introduced from the *Moosfee* and the *Futawa-i-koobra* in explanation of the term *Gheebut-i-moonqutaa* or remote distance, in which it is held to mean, if the guardian of the infant be at the distance of three stages, and it is stated in the *Futawa-i-surajeea*, in explanation of the same term, to signify, if the guardian be at the distance of three days' journey, and it is explained in the *Rusail-ool-arkan*, that one stage means as far as a person may be able to travel, at a moderate pace, in the shortest day of the year, between morning and the setting of the sun. What constitutes absence.

CASE X.

Q. Should the property left by two brothers devolve entirely on their widows? and if the whole property should not devolve on them, to what portion will they be entitled, and to whom will the remainder go? Are the widows entitled to dispose of their late husbands' property by gift, and if they have a right to do so, is the deed of gift, executed by them, in favour of one of the husband's heirs, available in Law.

R. If the property of the husbands be insufficient to satisfy the debt of dower which their widows have a right to claim, the whole property will devolve on them; and if it should be more than sufficient for this purpose, the property will, in the first instance, be applied to satisfy their claim, and, after such satisfaction, if there remain any surplus, it will be made into four parts, of which one-fourth of their respective husbands estate will go to the widows in right of inheritance, provided there are no children nor son's children. If no dower should be due to the widows, and their claim to dower should have been otherwise satisfied, one-fourth of the whole property will go to them, and the remaining three-fourths will go to the other heirs of the husbands.

If the widows were seized of their husband's property in virtue of proprietary right, as for instance in satisfaction of their dower, in this case they are entitled to dispose of it by gift; otherwise they can only dispose of it to the extent of their own interests, and their gift of the whole, in favour of one of the husband's heirs, is inadmissible. According to the first supposition, the property given, after complete seizin by one of the husband's heirs, will belong exclusive to him as donee. According to the second supposition, the donee will take the property to the extent only of the donor's interests, and the remainder will go to such person or persons as may be entitled thereto in virtue of their right of inheritance; for, in this case, the gift is not rendered null and void by reason of the donors not possessing exclusive proprietary right, inasmuch as the indefiniteness was supervenient.* Although the widows, at the time of the execution of the deed of gift, were not seized of the property, yet if, agreeably to their desire, the donee, in pursuance of a Judicial Decree, became subsequently seized thereof, the fact of the donors having been out of possession at the time of making the gift is not sufficient† to invalidate it. It is laid down in the *Buhroorayiq* on the subject of the gift of outstanding debts,—" A

Of supervenient indefiniteness in case of gift.

Gift of property not in possession of the donor, when valid.

* The meaning of this is that, when a person makes a gift to another of property, of which, apparently, the donor was the sole proprietor, but, to a part of which, the right of a third person was established, at a period of time subsequent to the gift, the donee will take to the extent of the interest of the donor, notwithstanding the supervenient indefiniteness, or, in other words, notwithstanding the fact of its being subsequently ascertained, that the donor was not sole proprietor of the property given at the time of gift. It would have been otherwise had the right of a third person been recognized to exist at the time of the gift, which would in that case have been null and void *ab initio*.

† But it is nevertheless necessary that possession should be given by the donors as soon as they have it in their power so to do, although a new formal declaration of gift is not requisite, and it is moreover requisite that the property should be in existence at the time of the gift, although not absolutely necessary that it should be in the possession of the donor. See Prin. Gifts 5.

NOTE TO CASE X.—Vide Case VI. In this, the donors appear to have been alive when the suit was brought; in that, the donor was dead, and had not possession during his lifetime, which circumstance constitutes the difference between these two cases. In one, possession could be given by the donor; in the other, death prevented the delivery. Vide Case XIV.—ED.

Vide Appendix Tit. Contract 1, wherein a case is reported pronouncing a similar conveyance invalid.—ED.

man makes over his outstanding debts by gift to a person who is not indebted to him, directing the donee to collect such debts and take them for his own use, this gift is valid."* It is evident that in such case, the amount of the debts, so transferred, was not in the donor's possession, but the gift is nevertheless admissible, and the donee, after realizing the debts, becomes sole proprietor of the amount. The case in consideration is analogous, as, from the terms of the deed of gift, it appears that the donors directed the donee to make complete seizin.

CASE XI.

Q. 1. If the master of a slave make a gift to such slave, of all his property, does the Law require, as a condition to the validity of the gift, that he should, in the first instance, emancipate the slave?

R. 1. If the master of a slave make a gift of all his property to such slave, without having previously emancipated him, such gift will be null and void, because the master is proprietor of every thing acquired by his slave. If a master therefore intend to make a gift to his slave, the Law requires that he should emancipate him in the first instance. Of a gift to a slave.

Q. 2. A deed of gift recites, that the donors have positively, and without any reserve, given to the donee, all the lands situated within a certain place. Is such deed vitiated, by the circumstance of its not specifying the boundaries of the lands?

R. 2. If the boundaries of the lands given are well known, and do not require specification, and no doubt exists regarding them, it is not necessary to specify them at the time of making the gift. If mention of the boundaries was omitted in the deed of gift, the omission must be attributed to an In a deed of gift of lands, not necessary to specify their boundaries, if well known.

* NOTE.—Baillie at page 5 of his Treatise on Sale shows from the Hidaya, vol III, p. 208, that the sale of a debt is invalid, and the quotation referred to implies, that the transfer even is objectionable.—ED.

error on the part of the scribe, because it is customary to insert the mention of the boundaries in legal documents of this nature. But such error does not vitiate the gift. If there exist a doubt respecting the boundaries of the lands given, a specification of them at the time of gift is necessary.

Q. 3. Supposing Gholam Hoosein Khan to be the heir of Budun Khan and Asalut. Is the circumstance of his absence, at the time they made the gift to the plaintiff, sufficient to invalidate such gift?

Consent of donor's heirs not requisite to a gift.

R. 3. When a person gives his property to a stranger, neither the knowledge of the heir, nor his presence, is necessary to render the gift good in Law.

Q. 4. The plaintiff was educated from his infancy in the house of Budun Khan. He relinquished his family, his tribe, and his religion, and became a convert to the Moohummudan faith. As Budun Khan and his wife were old and infirm, and had no children, he managed all their concerns, and every thing was at his command and disposal. Those persons made a gift to him of the whole of their property and effects, not of a part only, (about which there might have originated a doubt, as to what was intended to be given, and what retained.) Under such circumstances, does the law require, that each individual article should have been pointed out, and that specific designation and mention of each of them should have been inserted in the deed of gift.

Specification not requisite where the gift comprises the whole property of the do-

R. 4. If the articles given were clearly known to the donors and the donee, and the donee accepted and took possession of them, their specification is not necessary to the validity of the gift. In drawing up legal docu-

ments, specification is usual; but, if omitted, the gift itself is not, according to law, invalidated.

nors, and is made in favor of only one donee.

CASE XII.

Q. A person had two sons, one of whom died before him, leaving a wife and a daughter. The person above alluded to made a gift of half of his property to the widow and daughter of his deceased son, without defining their respective shares. He remained in joint possession of the property with them, and, some time afterwards, he took from the donees an agreement, nominating him to the management of the property given. During his lifetime he regularly paid to the donees the profits of half the property. Under these circumstances is the undefined gift to the two donees in question good and valid, according to Law, after the decease of the donor?

R. It appears in this case, that the deceased proprietor made an undefined gift of half his property to the widow and daughter of his deceased son, without specifying their respective shares, and that he caused them to execute an agreement, nominating him (the donor) to be manager of the half given to them, continuing however during his lifetime to give them regularly half the profits; under these circumstances, if the property in question be of an indivisible description, such as a well or a pond, the gift will be valid. But if the property, which is the subject of the donation, was divisible, such as land, and there were two donees, whose respective shares were not defined, all authorities concur in admitting the validity of the gift, if the donees were paupers or in indigent circumstances, and it cannot be resumed after the death of the donor; but if the donees were rich, the gift will be invalid, and seizin therefore will be of no effect. The

Gift of undefined property (though divisible) to two paupers is valid.

death of either the donor or donee operates to preclude the resumption of a gift.*

CASE XIII.

Q. 1. Two persons are joint proprietors of an estate. The one makes over to the other the proprietary right to his share. Does the circumstance of the donor's having a joint interest invalidate the transfer.

Objection of indefiniteness not applicable to a gift made by a person to his sole partner.

R. 1. Supposing the donor to have been of sound disposing mind, the circumstances of his being joint proprietor does not by any means invalidate the transfer; because, in this instance, the objection of indefiniteness, arising from a confusion of several interests, which renders a transfer invalid, does not exist. This supposes that there was no other person possessing a proprietary right in the property transferred, except the donor and donee.

Q. 2. Supposing the donee to have been an infant at the time of the transfer, will seizin on his behalf by the brother of his grand-father, be a sufficient seizin according to Law?

Of a gift by a father to his minor son.

R. 2. Such seizin will not be deemed legally sufficient, because the Law requires seizin by the donee, except in the case of a gift made by a father to his minor son,

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* It is a Principle of Law (See Prin. Gifts 7) that, in the case of a gift to two or more donees, the interest of each should be separated and defined. The exception to the rule, in the case of a charitable gift to paupers, is accounted for by two arguments, the casuistry of which may perhaps be excused for the sake of their charity. According to one authority, the reason is, that the Almighty Author of all Bounty is the immediate and sole donee, from whom it reverts to the poor; while according to another authority the reason is, that a charitable gift resembles a *Hiba-bil Iwuz* or gift for a consideration (See Prin. Gifts 15) in which mutual seizin not being necessary, the objection of indefiniteness (which is a preventative of seizin) does not apply. The consideration, it is maintained, consists in the pleasure resulting from the consciousness of having performed a virtuous action.

and a few other specially excepted instances. According to the *Shurhi Viqaya*,—"A gift made by a father to his child is perfected by the mere declaration of it." The gift of a stranger to such child is perfected by his seizin, if he have discretion, or by the seizin of his father or grand-father or mother, provided he is residing with her, or even by the seizin of a stranger who has the care of the minor. Such is the doctrine maintained in the *Hidaya* and other authorities. The meaning of it is, that if a father make a gift to his child, that is to say his minor son, who may not have discretion, consisting in the capacity of distinguishing between that which is advantageous for him and the reverse, such gift is completed by the mere declaration of it, and there is no necessity for acceptance or seizin on the part of the donee. But if a stranger make a gift to a child, such gift will be perfected on the seizin by the donee, if he have discretion, or by seizin made on his behalf by his father or grand-father, or guardian appointed by them, or failing those persons, by his mother, or by the seizin, on his part, of a stranger who has the care of his education and under whose protection he lives. The seizin therefore by the grand-father's brother will not be legally sufficient, unless the donee, during his minority, was living under the protection of that relation. Seizin of guardians sufficient in certain cases.

Q. 3. Supposing the grand-father's brother not to have surrendered possession to the minor until he attained the age of majority, will this circumstance invalidate the transfer, admitting that the minor was living under the protection of that relation?

R. 3. Such circumstance will not invalidate the transfer, because in point of fact the seizin of the grand-father's brother is equivalent to the seizin of the minor. And of protectors.

Q. 4. If, at the time of transferring the proprietary right, there was a third sharer in the estate in question, will this circumstance invalidate the transfer of the donor's share?

Gift how invalid by reason of indefiniteness.

R. 4. Such circumstance will, undoubtedly, invalidate the transfer, because it superinduces the legal objection of indefiniteness. Unless the share of the donor be separated and parcelled off from the joint property, either previously, or subsequently to the gift, it operates, to prevent a legal transfer of proprietary right.

CASE XIV.

Q. A person died, leaving as his heirs, two widows and a daughter. A few years after his death, both the widows made over by gift to the daughter, all their right and title to the property left by the husband. She (the donee) executed an agreement in favour of her mother, engaging to provide her during her lifetime with food and raiment, and after her death to perform her funeral ceremony and obsequies. The donors caused the rents of the estate to be paid to the donee, who afterwards, before the death of her step-mother, disposed of the landed property so acquired, by gift to the defendant, and he, four months after the death of the donor, (who died before her step-mother) took possession of all her property, in virtue of the gift. It is proved, by the testimony of witnesses, that the donee is a son of the donor's uncle, but whether the son of a paternal, or of a maternal uncle, does not appear. Now the mother of the first donee (that is to say one of the widows who survives) wishes to revoke the gift which she made in favour of her daughter. Under these circumstances is she, according to the Moohummudan Law, competent to resume the gift, and to recover the estate from the possession of the second donee or not?

R. According to Law, the gift which was made by the widows of their legal shares is valid and good. It is laid down in the *Viqaya*,—"If two persons jointly make a gift of a house to one man, it is valid." The agreement executed by the daughter in favour of her mother does not invalidate the gift; as is declared in the *Hidaya*,—"Gifts are not affected by being accompanied by invalid conditions. The gift is perfected by the donors delivering the possession of it to the donee." So also in the *Viqaya*,—"Gift is perfected by complete seizin." The donor is not entitled to revoke* the gift which she made in favour of her daughter, because, in this case, there are two obstacles to resumption; first: the death of the donee; agreeably to the doctrine laid down in the *Cunzood duqaiq*,—"One obstacle to the resumption of a gift is the death of one of the parties;" and secondly, relation within the prohibited degrees; as is stated in the *Hidaya*,—"If a person make a gift of any thing to his relation within the prohibited degrees, it is not lawful for him to resume it"† The donee made over all her property by gift to the son of her uncle, who did not however make complete seizin of it during her lifetime; on which account her gift in favour of him is null and void; as is laid down in the *Ibrahim Shahee*,—"A gift cannot be perfected but by the complete seizin of the donee." So also in the *Hidaya*,—"If the donee take possession of the gift in the meeting of the deed of gift, without the order of the giver, it is lawful, upon a favorable construction. If, on the contrary, he should take possession of the gift after the breaking up of the meeting, it is not lawful, unless he have the consent of the giver so to do." The gift, which was made by the donee in favour of her uncle's son, being thus null and void, the property in

Of a gift with invalid conditions.

A gift from a mother cannot be resumed, nor any gift after the death of the donee.

But it may revert to her as heir, in de-

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* Note.—Vide Case VII, which contains an opposite opinion in the case of the son of a daughter.

† See Prin. Gifts 13.

fault of the donee's seizin.

dispute should be considered as the estate of the daughter, and it should be first applied to pay for her funeral ceremony and burial, without superfluity of expense, yet without deficiency; next to the discharge of her just debts, then to the payment of her legacies out of a third of what remains, after her debts are paid; and if there remain any surplus it should be made into three parts, of which one will go to her mother as her legal share, and the remaining two to the son of her uncle (if he be the son of her paternal uncle) as residuary; otherwise he will not be entitled to any share of the inheritance, and the mother will take the whole property left by the daughter, in satisfaction of her legal share and on account of the return.*

Share of a mother with a paternal uncle's son.

And with a maternal uncle's son.

CASE XV.

Q. A person, after the death of his first wife, without any relinquishment on her part, or satisfaction made by him of her claim to dower, marries a second wife, and then confers on such second wife the proprietary right to his entire property, in lieu of dower. He however does not put her into possession, but retains it himself. Afterwards, when of a sound disposing mind, he executes a deed conveying to the heirs of each of his wives the joint proprietary right in his estate, not reserving any part of it. Under these circumstances, is the gift in lieu of dower, made by him to his second wife, to be considered valid and to be upheld, notwithstanding the debt due by him to his first wife on the same account; or is he at liberty, notwithstanding and subsequently to such gift, to distribute his property among the heirs of both his wives?

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* The reason of this is, that a paternal uncle's son is a residuary heir, and inherits together with a legal sharer; whereas a maternal uncle's son ranks among the distant kindred only, who are altogether excluded from the inheritance, if there be any legal sharer entitled to the return.

NOTE to Case XIV. Vide Cases VI. and X.

R. If the person, whose first wife was deceased, in making the gift to the second wife, had expressed himself to this effect; that he had made a gift to, and conferred on her, the proprietary right to his entire property, in exchange of a certain portion of her dower, this is not, according to Law, a gift in consideration of an exchange, but it is a contract of sale, both as to the condition and effect. Such is the universally admitted opinion, and, in a contract of sale, seizin is not a requisite condition. The circumstance of his being indebted to his former wife, does not incapacitate him from concluding a contract of this nature, because a debtor is not precluded or interdicted from the disposal of his property. Such contract would therefore be upheld, the thing sold must be considered to be the property of the purchaser, and the seller is not at liberty to make a subsequent disposition of the property sold, among the heirs of his two wives. But if he had expressed himself to this effect; that he had made a gift to and conferred on her the proprietary right to his entire property, on condition, that she would give to him a certain portion of her dower, and the donee accepted the condition, it would be a gift on stipulation. According to Law it is considered in the light of a gift, as to the condition, and sale as to the effect. Seizin is requisite to its validity, and the gift cannot be said to be established until the parties shall have made seizin, but the property conferred remains, as formerly, at the disposal of the donor. He will, therefore, be at liberty to make a subsequent disposition of it among the heirs of his two wives, because an owner has unlimited power over his own property. Authorities extracted from the commentary of *Chulpee*,—" I have given to you this slave for this garment of yours or for one thousand dirms." To which proposal the person addressed assents. This is a contract of sale both as it regards the condition and

Definition of *Hiba-bil Iwuz* or mutual gift.

Resembles a sale, and seizin is not requisite.

Definition of *Hiba-ba Shurt ool Iwuz* or gift on stipulation.

Resembles a gift, and seizin is requisite.

Authorities in the case of a *Hiba-bil Iwuz*.

the effect, agreeably to the doctrine maintained in the *Kifaya*, and, universally, in other authorities. So also in the *Shurhi Viqaya*,—"A contract of sale is established by conferring a right to one thing in lieu of another." So also in the *Hidaya*,—"The expressions I have given you this for that," or "take it for so much" have the same signification as the terms, "I have sold or purchased from you." So also in the *Viqaya*,—"Where these exist the sale is complete." By these are meant declaration and acceptance, and, when these are found to exist, the sale is binding; from which it follows that seizin is not a condition, and where these do not exist the sale is not binding. According to the *Shurhi Viqaya*, a person of disposing mind is not inhibited by means of imbecility or profligacy or debt. This is the doctrine of *Aboo Huneefa*. But, acccording to *Shafei* and the two disciples, a man may be inhibited by reason of imbecility. According to the same authority, when creditors petition a Court of Justice to restrain an insolvent debtor from alienating his property by sale or other obligation, an order to that effect may be granted. According to *Shafei*, a profligate person may be restrained with a view to his correction. According to the commentary of *Chulpee*, it is necessary, in the case of an inhibition for debt, that the creditors should pray for the restraint being laid-on.* But, in the present instance, it does not appear that the creditors made any petition to that effect. In the *Viqaya* it is stated that a gift on stipulation is a gift, as it regards the condition, and therefore seizin is requisite, and it is moreover stated to be a sale, as it regards the effect. In the *Shurhi Viqaya* a definition is afforded of what constitutes a gift on stipulation, as if one man should say

Of inhibition in cases of imbecility.

And in cases of profligacy.

And in cases of debt.

Authorities in the case of a *Hiba-ba Shurt-ool Iwuz.*

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* Even in this instance, however, the inhibition cannot be general, but the debtor may be restrained from doing any act manifestly collusive and prejudicial to the interests of his creditors. See Prin. Debts 7.

to another; "I have given you this thing on the condition of your giving me that." It is also laid down in the *Hidaya*, that, in all cases of contract of gift on stipulation, mutual seizin of each of the articles exchanged is necessary.*

CASE XVI.

Q. A respectable individual, who died seven or eight years ago, had three wives. By his first wife he had a son and two daughters; by his second, two sons and three daughters, and by his third, only one daughter. The first wife with her children are living, and are in possession of all the property left by the deceased. The second and third wives died before their husband, but their children survive, and those by the second wife now lay claim to a sum little short of fifteen thousand rupees, that is to forty-nine out of ninety-two parts of the estate. The first wife and her children, who are the defendants in the present action, plead, in answer to the claim, that some years previous to his death, the deceased husband made over all the property, moveable and immove-

* This case exhibits a distinction between the terms of *Hiba-bil Iwuz*, or mutual gift and *Hiba-ba shurt-ool Iwuz* or gift on stipulation. See Prin. Gifts 15 and 16. The distinction would at first sight seem to be merely of a verbal nature; but from the nature of the terms used it does not appear to be wholly groundless. They say that *Hiba-bil Iwuz* is a sale in every sense of the word. In sale mutual seizin is not requisite to render the contract valid, and the terms in which a contract of this kind is entered into, imply that the articles opposed to each other are present and that there is no danger of either party suffering from the other's fraud. "I have given you this for that" implies that the consideration is present, and that the person will take care to receive it before parting with his property; and the law therefore annexes to it the quality of a sale, both with regard to the condition and effect *Hbia ba shurt-ool Iwuz* they say, is a contract of a different description. The terms used imply a contingency. Thus "I have given you this *on condition* of your giving me such a thing." Now, in this contract it is observed, that, as to the condition, it has the property of a gift, in which seizin is requisite; otherwise, if it were valid and binding without such condition, the consideration might be withheld, and it might thereby become as it were a *nudum pactum*. As to the effect, this contract is declared to have the property of a sale, that is to say, after reciprocality of seizin, it becomes in effect a sale.

able, ancestral and acquired, to his first wife, by a deed of *Hiba-bil Iwuz* in exchange for three lacks of rupees due to her on account of dower, which deed was duly authenticated and attested. In support of this plea the defendants filed the deed, assigning the property as a *Hiba-bil Iwuz.* It appears from the evidence of the witnesses adduced on the occasion that the deed in question was executed by the deceased husband, to appease the anger of his wife, who, having taken umbrage at some domestic occurrence, was on one occasion, about to leave her husband's house and to retire to that of her brother. It further appears from the evidence in this case that, although the deed purporting to be a *Hiba-bil Iwuz* recited that the contracting parties had made mutual seizin of the articles opposed to each other, yet that, in point of fact, the husband remained in possession of all his property till his death. Under these circumstances, can such a deed operate to prevent a devolution of the property agreeably to the Laws of Inheritance?

Gift is of two kinds.

R. Gift is of two kinds—It is either unqualified and void of any consideration, as, where the donor makes an absolute gift of property, in which case seizin of the property give is essential to the validity of the gift: or qualified, of which there are two descriptions, first, *Hiba-ba Shurt-ool Iwuz,* which is accompanied by the expression of a condition, and consists in a person offering to give to another something on *condition* of his receiving from the donee something else. In this case, also, seizin of the thing given is requisite, and it is also essential that it should be defined and separated from the rest of the donor's property. But this description of gift resembles a gift in the first stage only, and sale in the last stage; that is, after the receipt of the consideration. Such a gift therefore, unaccompa-

Of unqualified gifts.

Of qualified gifts.

Of Hiba ba Shurt-ool Iwuz.

nied by seizin, cannot operate to prevent the devolution of the property agreeably to the Laws of Inheritance, after the satisfaction of all prior claims on the estate, such as debts, dower, legacies, &c. Secondly, *Hiba-bil Iwuz*, which consists in a person saying to another that he has given such a thing for such a thing, as for this cloth, or for this slave, or for a thousand dirms; and this description of gift resembles a sale in both stages, agreeably to the universally received opinion; in which case the seizin of the donee is not an essential condition. It appears also that the deed executed by the husband was of this description, and if it be duly proved, it will certainly supersede all claims of inheritance. This opinion is delivered in conformity to the doctrine contained in the *Hummadeea*, the *Kholasa* and other Law Tracts.* *Of Hiba-bil Iwuz.*

CASE XVII.

Q. A person dies, leaving two wives; but during his lifetime he made a gift to one of them of all his property, including his household effects, money and jewels, in lieu of the dower stipulated for her at her nuptials. On the death of the individual above alluded to, his two wives (the one to whom he made the gift having had by him one daughter, and the other two daughters) enter into a dispute relative to the succession to his property. Under these circumstances, is the gift of the husband valid, or in what proportions should the estate be distributed?

R. It appears that the gift, in this case, was of that description of gift which is technically termed in Law a *Hiba-bil Iwuz* or gift for a consideration, and this species of gift resembles a sale both in principle and effect; but there is a

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* Prin. Gifts 15 and 16.

Vide App. Tit. Deed 2.

Of *Hiba-bil Iwuz*; money forming part of the consideration on both sides.

doubt as to the legality of this transaction, from the circumstance of the articles opposed to each other consisting partly of money, which constitutes a *Sirf* sale. In this description of contract seizin on the spot is essential to its validity. If seizin was made, the transaction must be held to be valid; if not, it must be declared null and void, and both the parties have a right to recede from the contract. So also the heirs and creditors are at liberty to set it aside and resume the property parted with, on repaying the consideration for which it may have been given, until which time, the property will remain as a pledge in the hands of the purchaser, but, when the consideration is restored, it will become subject to the Law of Inheritance; and, in this event, it should be made into forty-eight parts, of which each widow is entitled to three and each daughter to fourteen.

CASE XVIII.

Q. A certain woman made a gift of her estate to another woman, with this condition reserved, that the donor was to enjoy the property during her lifetime, and, that on her death, it was to devolve on the donee. Agreeably to this gift, the donee entered upon the estate, made the collections of the rents and profits, and delivered them to the donor. The donor, however, all along kept possession of a small portion of the estate. According to Law, is such gift valid or otherwise? and under it, had the donee power to alienate the estate by sale, and would a deed of sale executed by the donee become valid and binding, from the circumstance of the donor's having become a party thereto, by formally affixing her name to the deed? and, after that, if the donor make a gift of the same estate to a third person, should such gift be upheld or set aside?

In case of an invalid gift, if the donor attest a deed of sale executed by the donee, the sale will hold good.

R. A gift is not perfected except by complete seizin. It appears, in this case, that the donor retained a portion of the estate and put the donee into possession of the remainder. This does not constitute delivery sufficient to establish the validity of the gift. Had the donor put the donee into possession of the whole of the estate, the gift would have been complete and the condition reserved, null and void; but, as the donor retained a part in her own possession, complete seizin cannot be established, without which a gift is of no effect; but as the donor formally affixed her signature to the deed of sale executed by the donee, such act is indicative of her being a consenting party to the sale, and that the contract was entered into by the desire of the donor, as well as of the donee. Under these circumstances the deed of sale must be considered valid and binding, and the contract founded thereon must be upheld. The donor has no authority afterwards to dispose of the same estate to another person.*

CASE XIX.

Q. 1. A woman made a gift of her entire property to her grand-son, a child aged five years, and five years afterwards, she made a distribution of it among all her heirs, including the above-mentioned grand-son. Is such a gift of her property to one heir legal and valid, and is she afterwards at liberty to resume it?

Of a gift by a grand-mother to her grand-son.

R. 1. Such gift is legal and valid, and does not admit of resumption, because between the grand-mother and her grand-son, there exists a relation within the prohibited degrees, and

* The decision in this case would seem at first sight to be contrary to the general doctrine of gifts; but, although not expressly mentioned, the reason for maintaining the validity of the sale was the fact of the donor's having parted with the possession of the thing given and made it over to the donee to be delivered to the vendee, when the gift ceased to be invalid, and it is a rule that resumption cannot take place after the property shall have been transferred to a third person.

such relation is an obstacle to resumption. Her distribution of the property among the heirs generally, five years after the gift, is null and void, and the former gift will remain in full force. According to the *Shurhi Viqaya,*—" To perfect the gift of a thing which is in possession of the donee, new seizin is not requisite. The gift of a father to his child is perfected by the mere declaration. Whatever gift is made by a stranger to him, he should take possession of, if possessed of sufficient discretion to do so, or his father or grandfather should take possession of it on his behalf, or the guardian appointed by either of them, or his mother, provided he be residing with her, or a stranger in whose house he is educated." In the same authority the obstacles to resumption of gift are stated to be seven. 1st. The incorporation of an increase with the gift. 2nd. The death of the donee. 3rd. The donee giving the donor a return or consideration. 4th. Alienation of the gift. 5th. The parties being husband and wife. 6th. Relation within the prohibited degrees. 7th. Destruction of the thing given.*

Of irrevocable gifts.

Q. 2. The grand-mother and the mother of the plaintiff in this case, that is to say the donee, after the death of the donee's father and five years after the date of the gift, make a distribution of the property among the other heirs. Is the distribution under these circumstances valid?

R. 2. The gift having been already declared to be legal, and the retractation of it inadmissible, the distribution subsequently made must necessarily be null and

* See Prin. Gifts 13. In that principle only five impediments to resumption are enumerated, but the fact of the parties being husband and wife, was included in the prohibition relative to relations. The destruction of the thing given was inadvertently omitted. The death of the donor also operates as an impediment.

void. The question is not at all affected by the fact of the donee's father being dead or in existence at the time. The authority above quoted from the *Shurh Viqaya* is sufficient to support this answer, in addition to which the following authority from the *Hidaya* is applicable:—"If a father make a gift of something to his infant son, the infant, in virtue of the gift, becomes proprietor of the same, provided, &c. The same rule holds when a mother gives something to her infant son whom she maintains, and of whom the father is dead, and no guardian provided, and so also with respect to the gift of any other person maintaining a child under these circumstances. If a stranger make a gift of a thing to an infant, the gift is rendered complete by the seizin of the father of the infant. If a person make a gift of a thing to an orphan and it be seized on his behalf by his guardian, being either the executor appointed by his father, or his grand-father, it is valid. If a fatherless child be under charge of his mother, and she take possession of a gift made to him, it is valid. The same rule holds with respect to a stranger, who has the charge of an orphan. If an infant should himself take possession of a thing given to him, it is valid provided he be endowed with reason."

Who can make seizin on behalf of an infant.

CASE XX.

Q. 1. Two brothers lived together in a state of union They were both married, and one of them had a son and three daughters. Both brothers joined in conveying their entire property to the son above-mentioned (who was only seven years and a half old at the time), executing a deed of gift in his favor to that effect. Is such gift valid according to Law?

R. 1. The gift by two persons to a minor, one of whom being his father and the other his uncle, of their joint pro-

Of gift by a father and

uncle to an infant.

perty, is valid, provided that there was the complete seizin that is requisite, that is to say, provided the uncle relinquished all participation in the property conveyed, resigning it to the father, who is empowered to make seizin on behalf of his minor son; but the gift is invalid if the uncle continued associated with the father in possession. Notwithstanding this doctrine, if a father make a gift, during his last sickness, of all his property to one child, in exclusion of the others, it is wholly illegal, because, in such a state, the heirs in general have an incohate right to his property, and consequently such disposition is unauthorized. If he make the gift when in health, the donor acts immorally and oppressively, and it is sinful in an ancestor to act injuriously towards his heirs.

And if made in last sickness.

If it exclude other heirs, immoral.

Q. 2. The donor having been proved to be guilty of injustice under the circumstances stated, will the gift nevertheless be upheld as good and valid?

But must be maintained.

R. 2. The gift of the entire property to one heir to the exclusion of all the rest, supposing the existence of the conditions noticed in the answer to the preceding question, is good and valid, notwithstanding the immorality of the act, according to the tenets of *Aboo Huneefa*. But *Naaman*, son of *Busheer*, the reporter of the traditions, and *Imam Aboo Yoosuf*, according to the opinion reported of him, and *Moohummud Amjud*, the author of the *Futawa Qinoojee*, deeming such gift to be an act of cruelty and oppression, have declared it inadmissible, and have pronounced that, in such a case, an equal distribution should be made among the heirs generally. Authorities for the above doctrines: In the *Futawa Surajool Mooneer*,—" A gift by two or more persons of a house to one individual is valid." In the *Hidaya*,—" If two persons jointly make a gift of a house

Authorities for its validity.

to one man it is valid." In the *Futawa Surajool Mooneer,*—"It is necessary that the gift should be divided off, and distinguished at the time of seizin." In the *Doorur-i-Mokhtar,*—"If, during a period of health, a person make a gift of all his property to one child the gift is valid, but the donor has acted sinfully." A tradition of *Naaman Bin Busheer* is related in the *Mishqat-i Shureef* to the following effect:—"When I was only seven years old, my father made me a present of a slave, to which my mother objected. On which the prophet was called to witness, and he was made acquainted with the circumstances. Upon this he asked my father, if he had any offspring beside myself, and a reply being made in the affirmative, he was next interrogated if he had made a similar present to each of his children. He replied that he had not. On which the prophet observed that this was injustice. The prophet said,—"Return home, fear God and make impartial distributions among your children." In the *Doorur-i-Mokhtar,*—"A superiority of affection manifested to one child above others is not blameable, because that is a natural impulse. So also in the case of gifts, unless injury to the others be intended. If such was intended, an impartial distribution should be made. According to the opinion of the latter, the gifts made to a daughter should be equal to those made to a son, which opinion has been approved." By the latter is meant *Aboo Yoosuf,* whose opinion is generally followed in judicial matters. As injury is declared to be the cause of the equalization, in every case of partial distribution, where injury appears to have been the object, it follows that an impartial distribution should be directed. But, where a man gives all his property to one child, the injury must of course be greater *a fortiori*. *Moulana Moohummud Amjud,* who has written a legal commentary, entitled the *Futawa Qinoojee,* expresses

And its immorality.

himself thus :—" It is a maxim that oppression practised by an ancestor towards his heirs is not allowable, but it is not generally understood merely to signify (as it really does) that the gift by a father, while in health, to one son of his entire property, or of any portion exceeding his due share, is injustice towards the others."

CASE XXI.

Q. 1. A person, having two wives, executes a deed in favor of the first, transferring to her all right and title to his property, real and personal, in satisfaction of her dower. Two years afterwards, he executes another deed, in favour of his second wife, transferring to her the right and title to one moiety of the said property, in satisfaction of her dower, having obtained the written permission of his first wife to do so. In this case will the second wife be entitled to half his estate, on his decease, in virtue of her claim of dower ?

Gift to one wife, by a husband, of property belonging to another, not sufficient, though made by the written permission of the latter.

R. 1. The husbbnd, in this case, transferred to his first wife the right to his entire property in satisfaction of her dower, previously to his assignment of a moiety of it to his second wife. This second transfer therefore is null and void because the proprietary right to the thing given, had passed from the husband and had vested in his wife. This is supposing that there was no permission granted on her part. But, admitting the alleged writing containing the permission to be fully authenticated, it merely states that the husband is at liberty to execute a deed assigning to his second wife half of the property, which he had before transferred to his first wife, in satisfaction of her dower; and it will not avail the second wife, because, the consent of the first is wanting to give effect to the deed *after* its execution by her husband. This does not appear to have been obtained, and the mere written permission is not

legally sufficient to entitle the second wife to take half the property.* From the evidence in this case, however, it would appear, that such permission never was given.

Q. 2. If the first wife did not make any written permission in favor of the second, will she be entitled to take half the estate on the death of her husband ; he not having given her possession of the property while he lived ?

R. 2. Under these circumstances she will not, *a fortiori*, be entitled to take any of the property. And *a fortiori* without permission.

Q. 3. The first wife executed a deed of gift of her entire estate to a person whom she had adopted as her son, and who was then a minor. The name of her adopted son was, at her solicitation, registered as proprietor of some parts of the estate, but not of others, of which it is proved that, for the period of two years and a half after the date of the deed of gift, she continued in possession, and was ostensible proprietor. It was also proved, that she mortgaged it in her own name, notwithstanding that the parents of the minor, whom she had adopted, were alive. Under these circumstances will the validity of the gift be sufficiently established by her seizin in behalf of her minor adopted son, or will the gift of the estate be rendered null and void, in consequence of the donee's not having made entire seizin, or not having been registered as entire owner.

* Some little degree of casuistry appears in this doctrine, although it is no doubt conformable to Law. The reason assigned is, that the husband could not have disposed of the property, in any manner, unless the first wife had reconveyed it to him in the shape of a gift or otherwise, or unless she had appointed him her agent for the purpose of transfer, in which latter case, the transfer should have been made in the name of the principal, and not in that of the agent.

R. 3. The gift of those parts of the estate of which the minor was registered as proprietor, and of which he took *bonâ fide* possession, is undoubtedly valid; but there is a difference of opinion among lawyers concerning his right to those parts of which the donor continued in possession, as ostensible proprietor. By some, the doctrine is maintained that the seizin by the donor on behalf of a minor donee, who is living in his family, but with whom he has no relation, is not sufficient to establish the validity of a gift, if the father of the minor be alive and present; but that it is sufficient if he be not alive and present. Others contend that the seizin of the donor (not being related to the donee) is sufficient to perfect the gift made to a minor, and this is the opinion of modern lawyers, such as the authors of the *Jama-i-roomooz*, *Burjundee*, *Doorur-i Mokhtar*, *Ibrahimshahee*, *Qohistanee*, *Moðltaqit*, &c., who have declared, that decisions are conformable to the doctrine of the sufficiency of seizin, by a stranger in whose house the minor donee resides. Those lawyers who maintain the opposite opinion do not pretend that it is followed in practice. The mortgage by the donor, in her own name, was not legal. Her having done so cannot affect the right of the minor donee, nor in any shape invalidate the gift; for the mortgage cannot be considered as a proof of resumption on the part of the donee, because resumption of a gift is not lawful under such circumstances. Besides it must be in express terms, and not implied by the donors appropriating the profits or other similar acts, and it is no where laid down that resumption of a gift is of two descriptions, one express and the other implied.*

Seizin by a stranger on behalf of a minor donee, when sufficient.

* There was a difference of opinion among the Law Officers, in their exposition of the Law relative to the first and third questions. The Kazee ool Koozat (Nujmooddeen Ali Khan) was of opinion that the written permission, granted by the first wife in favor of the second, was sufficient to uphold the disposition made

Q. 4. If the estate, which the donee transferred by gift to her adopted son, was held by her in joint proprietary right with her brother, will this circumstance affect the validity of the gift, as far as relates to her own property?

R. 4. The gift will be null and void by reason of its indefiniteness, the brother having a joint proprietary right. Gift of joint property.

CASE XXII.

Q. 1. A person disposed of his property, consisting of a dwelling house, to another, but did not relinquish the possession. The donor and donee continued jointly seized of the property given. Under such circumstances is the gift valid according to Law?

R. 2. Such gift is not valid according to Law, because, in the case of a gift, it is a legal condition, that the donee should take complete possession, without the association of any other person, and that the donor should make complete delivery, and totally relinquish the possession of the property transferred, leaving it exclusively to the donee. But in the case stated, it appears, that the donor did not relinquish possession of the gift. On the contrary, the donor and donee remained in joint occupancy. It also appears, that the donor inhabited the house, until the time of his death, and indeed that he died in it. This fact has been clearly proved. In books of Law it is expressly stated, that if a person dispose by gift, of a house to another, and continue himself to inhabit it, or even keep some part of his property therein, the gift The gift of a house is null and void if the donor subsequently occupy it or retain any part of his property therein.

by the husband in her favor; and he was moreover of opinion that a mortgage having been granted by the donor, in her own name, of the lands formerly given, amounted to an implied resumption of the gift, and should operate as such. The legal opinion of the majority, however, as laid down in the above answers, was adhered to.

Exceptions.

is void, from the circumstance of complete delivery and possession not having been established. Except in the instance of a wife, who may give a house to a husband, in which case the gift will be good, although she continue to occupy it along with her husband, and keep all her property therein; because the wife, and her property, are both in the legal possession of her husband. So also some lawyers have held, that if a father transfer his house to his minor son, himself continuing to occupy it, and to keep his property therein, the gift is valid; on the principle, that the father in retaining possession, is acting as agent for his son, according to which doctrine, his possession is equivalent to that of his son. But some lawyers object even to this principle.* It is clear, however, that with the exception of the two instances above quoted, namely, that of the gift from the wife to the husband, and from the father to the minor son, any person disposing of his house to another by gift, must relinquish possession, to legalize the donation, and must so completely vacate it, as not to leave even a straw of his own property remaining therein, and must divest himself of all use and benefit therefrom, surrendering it totally to the donee. Under such circumstances only, can there be said to be a complete delivery and possession, and the gift consequently be held valid. In this case, the donor continued to inhabit the house given, subsequently to the gift, in the same manner as he had previously done, and lived in it to the hour of his death. The gift, therefore, is wholly and unquestionably null and void, and being so, the proprietary right in the house remained vested in the donor, until his death; after which event it should devolve on his legal heirs. Authorities: *Hidaya*,

* See Prin. Gifts 8 and 9.

—"In case of gift seizin has been especially ordained; therefore complete possession is made a condition." *Shurhi Viqaya*,—"Gift is perfected by complete seizin, in such manner as the nature of the gift may admit of. Moveable and immoveable property have each their appropriate mode of seizin." The commentator *Mirza Chulpee* has observed, that "the proof of right to a gift depends upon its being separated and delivered." *Kazee Khan*,—"A person gave a house to another, and delivered it to him, but there were the effects of the donor in it. This is not legal, because the thing given is employed to the use of something that was not given, and consequently this is not a delivery; that is to say, there is not established, on the part of the donor, a complete delivery, for the house may be delivered and the use of it retained." Another example is given in the same authority,—"A person gave to another a house, in which was the property of the donor, or a bag in which was his food. In these cases the gift is not valid, because the things given are employed for the use of that which forms no part of the gift, which circumstance prevents complete delivery, although not preventive of delivery, in the ordinary acceptation of the term. The former however is the condition, and not the latter." *Foosool Imadeeya*,—"A gift with the retention of use is void. The use of the thing given for the benefit of the donor, prevents the completion of the gift, because seizin is a condition, that is to say the donee must prove complete possession, which in this instance cannot be done; but as to possession, in the ordinary acceptation of the term, that may be established, though the use be retained." *Ashbah-o-Nuzayir*. In the first chapter of the book of gift it is stated,—"A gift, with the retention of use, is void, except in a case where a father makes a gift to his minor son, as is laid down in the *Zukheera*, the author of which makes an exception in

Authorities for the necessity of the donor's entire relinquishment and the donee's exclusive possession.

favor of a minor son, receiving a present from his father." *Kazee Khan*,—" If a father make a gift of land to his minor son, and cultivate it subsequently, or make a gift of a house to him and continue to reside therein, the gift is void." In the *Moojurrud*, the following is stated as the opinion of Aboo Haneefa : " If a father make a persent of a house to his minor son, and continue to reside, or keep his property therein, or permit others to dwell therein, without demanding rent, such gift is valid, and the father is acting for his son, but if rent be received by him, the gift is null and void." This is the latest doctrine of Aboo Haneefa, but it appears, that in the first instance, he did not make the case of a father and his minor son an exception to the general rule declaratory of the invalidity of gift, with retention of use.*

Q. 2. Is a gift conveyed orally, without the execution of any deed, valid, or not?

Circumstances requisite to complete a gift.

R. 2. A gift orally conveyed is valid, because tender and acceptance are the only essentials to a gift, and complete seizin of the house, none of the donor's property being therein, and its not being used for his benefit, are the only conditions to perfecting the gift. A writing or deed is neither among the essentials nor conditions. Therefore in a case of gift, if oral tender and acceptance are established, and the condition of complete seizin be also found to exist, that is to say, that the thing given was in no manner employed for the benefit of the donor, and that it was not undefined, the

* The meaning is that, in treating generally of the doctrine concerning the validity of gifts, which requires the possession of the donor to cease entirely and that of the donee to accrue exclusively, *Aboo Haneefa* did not make any special exception in favour of a gift made by a father to his son; but that in treating of this particular case he has declared that a father may retain possession, as *agent* for his son, of property bestowed by himself, during the minority of such son.

gift is valid, although no deed may have been executed ; but, from the proceedings in this case, it has been proved, that the house given was inhabited by the donor until his death, and the use of the thing given, for the benefit of the donor, renders the gift null and void in Law. Another cause to render the gift null and void in this case is, that it has been proved; that the house was given both to the grand-daughter of the donor and to her husband, and it is laid down in the *Hidaya* and other Law Books, that a gift by one person of a house to two persons is invalid, because the gift is undefined, the house having been given to two persons jointly and no division of their respective shares having been made ; and an undefined gift is by Law invalid. The gift therefore is null for two reasons : the one its being used for the benefit of the donor by his inhabiting it ; the other, the undefined nature of the gift. It is alike, whether there be a writing or not. The gift will be invalid, if there are grounds of invalidity, although a deed may have been executed, and it will be valid, if there are grounds of validity, although a deed may not have been executed. In this case, the absence of a deed is not the cause of the invalidity, but the causes are, that the house was used for the benefit of the donor, and that the gift was undefined.

Gift of a house by one to two persons.

Authorities : *Hidaya*,—" Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts ; and seizin is necessary, in order to establish a right of property in the gift." In the same authority it is laid down, " If two persons jointly make a gift of a house to one man, it is valid ; because as they deliver it to him wholly, and he receives it wholly, no mixture of property can be said to exist at the time of seizin." If one man make a gift of a house to two men, the gift is invalid, according to Aboo Haneefa. The two disciples

Authority for the essentials of gift.

Gift of a house by two persons to one.

hold it to be valid, as the donor gives the *whole* of the house to each of the two donees (inasmuch as there is only one conveyance); there is consequently no mixture of property, in the same manner as where one man pawns a house to two men. The arguments of Haneefa upon the point are two fold. First,—The gift, in this case, is a gift of *half* the house, to each of the donees (as is evident from this, that if one man give to two men something incapable of division, and one of them accept the same, the gift becomes valid, with respect to his share); and such being the case, it follows that at the time of seizin by each of the donees, a mixture of property must take place. Secondly,—As a right of property is established in each of the donees, in the extent of one-half, it follows, that the conveyance or investiture must also be in the same proportions, since the right of property is an effect of the conveyance: on this condition therefore, that a right of property is established in each with respect to one-half, an undefined mixture of their respective shares in the gift is fully established. It is otherwise in a case of pledge, because the effect of that is *detention*, not right of property, and the right of detention is wholly and completely established in each of the pawn-holders, insomuch, that if the pawner should discharge the debt of one of them, still the right of the other to a complete detention remains unimpaired."

Pledge of a house by one to two persons.

It is laid down also in the same authority, that "a gift of part of a thing, which is capable of division, is not valid, unless the given property be divided off and separated." The meaning of "divided off" is that it should be disconnected with the property of the donor, and the right to it not exercised by him. The meaning of the Law is, that it should not be employed for the benefit of the donor. For example: a person gives a house to another, but keeps his effects therein, or inhabits the house, the gift

Authorities.

is void, because, in the first instance, the house is employed for the benefit of the property of the donor, consisting of his effects; and in the second instance, although not employed for the benefit of his property, it is employed to afford him the benefit of a residence.

Q. 3. Is a gift valid, made by a person to the husband of a grand-daughter, notwithstanding that, at the time, he has a daughter, and three other grand-daughters living?

R. 3. A gift made under the circumstances stated in the third question is legally valid, because a person is at liberty to give away his own property as it suits his inclination. If he pleases he may give it all to one of his children, or to strangers, or to beggars. No one of his children or descendants have a right to oppose his inclination, for the right of the heirs to the property does not accrue until after his death and not during his lifetime. If, therefore, notwithstanding he have one daughter and four grand-daughters, he dispose of all his property by gift to the husband of one of the grand-daughters, the gift is undoubtedly valid. But, in this case, a great discrepancy is apparent, between the claim of the gift and the evidence of the witnesses, and it is laid down in the *Hidaya*, that where there is any difference between the claim and the evidence, the latter must be rejected. The difference is, that the claim, as set forth in the reply, contends that the gift was made to the defendant and her husband jointly. Now, according to this claim, a gift is presumed to have been made by one person to two, which, from its indefinite nature, is illegal, and it signifies nothing therefore, whether such gift is or is not established by the evidence of witnesses, as was before stated. But in the claim, as set forth in the rejoinder, it is contend-

Of the father's power over his property.

Contradictory pleadings in different stages

of a proceeding are fatal to a claim.

ed that the gift was made to the defendant alone; and from the evidence adduced in support of the reply, it appears that the gift was made to the husband of the defendant solely. These three assertions therefore are at variance with each other. The first contending that the defendant and her husband are both the donees; the second contending that the defendant is the sole donee; and the third, that the husband of the defendant is the sole donee.

The interests of a husband and wife are distinct.

To suppose that a gift made to either a husband or his wife is, from their union, in the same predicament as a gift made to both of them, is a vulgar error, and has no foundation in Law.

Of evidence at variance with a claim.

Therefore the evidence of the witnesses, which is neither conformable to the claim set forth in the reply, nor to the claim set forth in the rejoinder, is inadmissible in Law and nugatory. (Here follows a summing up of the discrepancies observable in the testimony of the several witnesses.) Their testimony, therefore, being at variance with the pleadings, which invalidates it, the gift is not established thereby. It has been shown also, that independently of this circumstance, the gift is invalid *per se*, from the continued residence of the donor in the house, and the consequent incomplete possession. Therefore it signifies nothing whether such gift be proved or disproved. As the house did not go out of the property of the donor until the day of her death, it will, after that event, devolve on her heirs.

Authority.

Authority: *Hidaya*,—"Where the evidence adduced by a claimant is conformable to the claim, it is worthy of credit, but not where it is repugnant to it; because, in matters concerning the right of the individual, the priority of the claim is requisite to the admission of evidence, and this exists in the former instance but not in the latter.*"

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* The meaning is that the nature of the claim must be asserted before evidence is adduced in support of it, and not afterwards. The evidence must uphold the claim, and not the claim the evidence.

CASE XXIII.

Q. 1. If the gift made by Musst. Sajidoonisa in favour of Fukhur-oodeen Hoosein to the extent of her own share (being one-fourth of the property left by her father,) be declared null and void, by reason of the property being undivided, or on any other ground of invalidity, and it be admitted, on the part of the donee, that, from the time of the donor's death, he himself and his guardian had possession of the property so given, is it legally incumbent on the donee to account to the donor's heirs for the profits which accrued from the estate, during his own and his guardian's possession?

Of mesne profits in case of an invalid gift.

R. 1. The mesne profits accruing from the estate in this instance (analogously to the Law by which invalid sales are governed) are not considered definite property, or identical with the estate itself, and, according to the opinion of Aboo Haneefa, Fukhur-oodeen Hoosein is not accountable to the heirs of Sajidoonisa for such profits. The two disciples maintain the contrary, but the opinion of Haneefa is best received and most acted upon.*

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* There is considerable obscurity in this doctrine. A quotation from the Hidaya may perhaps render it more intelligible,—"It is to be observed that if a person claim a debt from another of a thousand *dirms*, and obtain payment of the same, and both parties afterwards agree that the debt was not due, in that case the profit which the claimant may in the meantime have acquired by possession of the money is lawful to him; because the *baseness*, in this instance, is occasioned by *invalidity* of right; for this reason, that the debt had been owing in consequence of the demand of the claimant, and the defendant's acknowledgment of it; and it afterwards appears that this debt is *not* the right of the *claimant*, but of the *other*, (namely, the *defendant*:) still, however, the thousand *dirms* which the claimant took in satisfaction for his demand have become his property, as the satisfaction for a claim becomes the property of the claimant, although it be under an invalid right;—and as the baseness, in this instance, is occasioned by the mere *invalidity* of right of property, and not by the absolute *non-existence* of that right, it consequently cannot operate, nor have any effect with respect to a thing of an *indefinite* nature, such as *money*, for instance."—*Hidaya*, vol. 2, page 460.

Q. 2. The rents due from certain tenants of one of the villages of the estate are declared receivable by the donee, but the rents of that village were taken collectively by all the sharers. The lands belonging to those tenants were not parcelled off, nor their boundaries defined, nor was there any specification of the village in the deed of gift, which merely mentioned the ancestral estate generally. Under these circumstances, will one-fourth of the village in question legally belong to the donee in virtue of such deed of gift?

Gift of land is not perfected by assignment of rents.

R. 2 By the mere specification of certain of the tenants of one of the villages, without a separation of the lands which they occupy, and a definement of boundaries, and without making any division, the gift of no part of the village is good; but if there was a regular separation of such lands from the remainder of the estate, by means of measurement; and the quantity occupied by the tenants defined, the land so divided off must be considered an independent portion of the estate, and not being indefinite, the gift of such fourth part of the village must, on the donee's making seizin, be held to be complete and binding.

CHAPTER V.

PRECEDENTS OF WILLS.

CASE I.

Q. A person sues for possession of a certain estate, founding his claim to proprietary right on the plea, that the deceased owner, in her lifetime, assigned over to and gave to him (the plaintiff) possession of her entire property, real and personal, with all the rights and profits appertaining thereto, with the exception of the estate now sued for, which was excepted by reason of its being then under litigation; and that she moreover made a nuncupative will* in his favor, formally and publicly nominating him her executor with power to realize all outstanding balances of every description which might be due to her, and to adjust all claims that might be made aginst her estate. Under these circumstances, has the claimant, in virtue of the assignment and will above recited, a legal right to such property as may not have been in the possession of the deceased owner during her lifetime? and what difference does the law make between a gift and a *Tumleek* or assignment of proprietary right? and also what authorities can be cited in favor of the validity of the assignment and will above specified.

R. A will signifies an assignment of property to take effect after death, or as if one should say to another "give such an article to such a person after my decease." The thing so given is called a legacy, the person giving the testator, the person to whom it is given the legatee, and the person to whom the trust of giving is confided is called the executor. Definition of a will.

* A nuncupative will, agreeably to the provisions of the Moohummudan Law, is of equal validity to a written one. See Prin. Wills 1.

App. Tit. Wills 3.

Of a legacy, the testator not being in possession thereof at his death.

It is essential to the validity of a will that the property willed away should exist in the possession of the testator at the time of his death,* otherwise the legacy will have no effect. For instance, if a person leave by will one-third of his flock of sheep to another, and it appear that, at the time of his death, he had no animal of this description, the legacy will be void, on the principle of its being necessary that the property should exist in the possession of the testator at the time of his death. The term *Tumleek* is one of general import and may be applied to a gift, whether unconditional or conditional, to a sale, or to a will. But the term *Hibba* (gift) signifies the immediate transfer of property to another without a consideration. Thus the difference between an assignment of proprietary right and gift is, that the one is general and the other particular. Legally speaking, therefore, the plaintiff, whether in virtue of a will or a gift, has no right to property of which the deceased owner was not in possession.†

Tumleek and *Hibba*.

CASE II.

Q. A woman died, leaving some moveable property, which, on her decease, was placed under the Seal of the Court, in consequence of her appearing to have not left any heirs. A proclamation for the appearance of

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* But it is not necessary that the subject of the legacy should exist at the time of the execution of the will. See Prin. Wills 8.

† From the above exposition of the Law it would appear, that there is but little difference in the provisions regarding gifts and those regarding legacies. With respect to legacies, the entire relinquishment of the donor must take place physically, and the exigency of the law is consequently so far fulfilled. But acceptance on the part of a donee is essential to the validity of gift; and a legacy is of course voidable at the pleasure of a legatee. The chief distinctions seem to be, that a legacy may be made, the subject of which is not in the possession of the testator at the time of the execution of his will, whereas a gift, under such circumstances is null and void, and that a testator, in willing away property to several individuals is not bound to separate and define the portions of each.

claimants having been issued, a woman came forward and stated that she was the daughter of the deceased, that the deceased had disposed of her in marriage, and that she was the lawful heir to all her property. The claimant moreover adduced four witnesses, who deposed on oath, that the deceased had, on several occasions, in their presence, declared that she had adopted the claimant, that she had disposed of her in marriage, and that the claimant was her lawful heir. Under these circumstances, is the claimant entitled to succeed to the property of the deceased woman, or should it be considered as an escheat to the Public Treasury?

A person declared by a proprietor to be his sole heir, takes as sole legatee.

R. It appears, from the question, that the deceased woman declared the claimant to be her heir in the presence of four witnesses. The obvious intent and meaning of this declaration is, that the claimant should succeed to her property after her death. It is impossible to put any other construction on these words, than that they imply a legacy of the entire property, and, though this is not expressed in the letter, yet regard should be had to the meaning of the declaration.*

CASE III.

Q. Is it legal for a man to leave his property by will to four persons, being strangers? and, supposing any of the provisions contained in the will to be contrary to Law, will this circumstance invalidate the will *in toto*, or only so far as affects such illegal provision? If the illegal provision render the whole will illegal, will it acquire validity by having been

* Where there are no heirs nor creditors, the Law allows of the entire estate being bequeathed by will, and it is not necessary (as it is in the case of gift) that the legacy should be express. On the same principle that a legacy may be retracted, (see Prin. Wills 11), it may be conferred, by implication.

Of a will containing an illegal provision.

acted upon and acquiesced in, for the space of two or three years after the death of the testator?

R. According to Law, the granting of legacies to the extent of one-third of the estate is admissible. The remaining two-thirds go to the heirs, who are, in this case, two widows and a sister, the former of whom will take a fourth, and the sister will take the remainder. If therefore any one should adduce a legal claim, the whole of the provisions of the will cannot stand. Property exceeding in amount one-third of the estate, cannot be taken by persons not being heirs. A part, therefore, of the will is contrary, and a part agreeable, to the Law; but the part which is illegal does not invalidate the whole. Those persons who, after the death of the testator, acquiesced in the will and permitted its provisions to be carried into effect, cannot retract without having recourse to Law.*

CASE IV.

Q. A Moosulmaun during his lifetime made a will, leaving his entire property to the son of his brother, notwithstanding the fact of his having then a wife living. The will was attested by his wife. Shortly afterwards he died childless, and after his death, his nephew aforesaid and his widow continued in joint possession of his property. On the widow's death her brother claimed her share of the property. Under these circumstances, is the will made by the deceased in favour of his nephew (such nephew being one of his legal heirs) a valid instrument, and sufficient to defeat the rights of the widow's heirs?

* The principal point of Law in this case is, that the general validity of a will is not affected by its containing illegal provisions. See Prin. Wills 9.

R. If the widow after the death of the husband consented to the will executed by him, it must be considered in all respects good and valid; because legacies in favour of an heir are void, only in case the other heirs do not consent,* and in this case, although the consent does not appear to have been express, yet it was clearly and unequivocally implied.

A bequest to one heir is valid with the consent (express or implied) of the rest.

CASE V.

Q. 1. There were two brothers, one of whom died, leaving three sons and a daughter. The surviving brother subsequently made a will in favour of his nephews and niece (children of his deceased brother), making all the real and personal property, ancestral and acquired, whether belonging to himself or to his brother, into seven shares, and assigning two shares to each of his nephews, and one share to his niece. He did not, however, during his lifetime, parcel off their respective portions of the property, and put them into possession, but merely empowered them to realize the profits of the property, agreeably to the shares which he had assigned them respectively. Under these circumstances, is the will executed by the surviving brother available in Law?

R. 1. The will is valid, because the testator is master of his own property, and has a right to make a legacy in favour of any one whom he chooses. As far therefore as regards his own property, whether real or personal, ancestral or acquired, his legacy of it to his nephews and niece is allowable, but, as far as regards the property which appertained to his brother, the disposition made by him is perfectly useless and nugatory; because his nephews and niece have an absolute legal right to inherit their father's estate, in the proportion

Of legacies, property of which did not belong to the testator, and in favor of persons some of whom were heirs.

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* See Prin. Wills 3.

of a double share to the male. The intention of a legacy is to create the right to property; but the legacy in this instance was superfluous; inasmuch as the legatees became entitled to the property of their father on his death, in virtue of their right of inheritance. The disposition by will, however, made by the surviving brother of his own property, is by no means invalidated by the circumstance of his not having parcelled off the respective portions, and put the legatees into possession during his lifetime, for indefiniteness in case of a legacy is allowable. His allowing them to realize the profits of the shares assigned to them respectively was merely an act of permission; in other words it amounted to a permission to others to make use of his property, and this is allowable; for, in an act of permission, indefiniteness is no objection, as it is in the case of an absolute gift. The will which he executed is suspended on the condition of his death, and, therefore, after that event, his niece is entitled to one-seventh part of his property, she not being one of his heirs. And, after she has realized her seventh share, to which she is entitled by the legacy, the brother's sons are entitled to share the remainder equally among each other in virtue of their right of inheritance; because they are both heirs and residuaries, and legacies cannot be left to heirs. The authorities for the above opinion are as follow: in the *Hidaya*,—"A will containing legacies which the testator was competent to bequeath and which he was not competent to bequeath, is valid for the former and not for the latter." So also in the same authority,—"If a person bequeath a third of his property to one man, and a third to another, and the heirs refuse their consent to the execution of both bequests, one-third is in that case divided equally between the two legatees; for where the will exceeds a third of the estate, and the heirs refuse their consent to the execution of the whole,

Distinction between gift of property and permission to exercise proprietary right.

Wherein consisting.

Authorities regarding the doctrine of wills and legacies.

it is then restricted to one-third, as has been already explained; and as, in the present instance, the right of both claimants is equally good, and the third is capable of division, it is therefore divided equally between them." So also in the *Shurhi Viqaya*,—" Proprietary right may be established, as well by granting a permission to exercise proprietary right, as by making an absolute gift; for instance, if the proprietor of a vessel of water should say to a party of people who had performed purification by *Tyummum*, that any one of them might use the water for the purpose of ablution; and there was a sufficiency of water for any one of them singly to have washed in, the purification which they performed by *Tyummum* becomes of no avail; for when one of the party purified himself by ablution with water, the rest must again have recourse to the purification by *Tyummum*, because the right of ablution was established in each individual severally. But if the proprietor of the water had said to them,—This water is your property collectively, and they took the possession of it as such, their previous purification by *Tyummum* is not rendered unavailable, because (according to the doctrine of the two disciples) in the case of an undefined gift, the proprietary right is vested in all the donees collectively, and each individual did not possess a sufficient quantity of water to enable him to perform the ceremony of ablution. But the more approved reason for this doctrine, according to *Aboo Haneefa*, is, that the water continued to be the property of the donor and that option was not established; for that where a gift is null, an option which is comprehended therein must necessarily be null also. Therefore if the whole party were to confer an option on one individual donee to use the water, and he failed to do so, the former purification by *Tyummum* of that individual is rendered unavailable, according to the doctrine of the two dis-

Authorities for the above distinction.

ciples, but not according to that of *Aboo Haneefa*, because, when they themselves had not the proprietary right, they had no authority to confer the option." The inference to be drawn from the above quotation is, that there is a distinction between conferring an option and making an absolute gift; seizin being necessary in the latter case but not in the former, and that indefiniteness invalidates a gift but not an option. This distinction is obviously inferrible. The following is an extract from the *Hidaya*: " If a man make a bequest in favour of a part of his heirs, it is not valid. It is to be observed, that in judging whether the legatee be an heir, or otherwise, regard is paid to the time of the testator's death, not to the period of making the will; because the efficacy of the will is established after the death of the testator." In the *Kifaya*, a commentary on the *Hidaya*, treating of the above passage, it is stated,—" If a person, having a son, left a legacy to his brother, and the son died during the lifetime of his father, the legacy is null."*

Of a legatee becoming an heir before the testator's death.

Q. 2. Supposing the words " *household effects*" not to have been inserted in the will, should this description of property be comprehended in the disposition of the estate, although not particularly specified?

Of a will containing words of general import.

R. 2. The household effects should be comprehended, because the terms used in the will are possessions and lands, in the former of which household effects are included; in the same manner as the term " lands " includes gardens, roads, &c., although those may not have been specifically mentioned. But the provisions of the will do not apply to all the children of the testator's brother. The daughter of the tes-

* But a person being an heir at the time of the execution of the will, and becoming excluded from the inheritance previously to the testator's death, can take the legacy left to him by such will. See Prin. Wills 10.

tator's brother will take a seventh share of the whole property, including household effects and every other description of property, agreeably to the provisions of the will. Afterwards, what remains the sons of the testator's brother will share among themselves equally, by reason of their right of inheritance as paternal kindred, for the daughter of the brother is not an heir, whereas the sons are heirs. The above is the true exposition of the Law in this case. Authorities: It is laid down in the *Tulweeh* and other Law Tracts,—"A general term comprehends all particulars, and this rule should be applied to all words of a general import;" for instance: "whatever I possess, and the things I possess," comprehend every species of property possessed by the declarer; and so must the will be construed, agreeably to the passages in the *Kifaya* and *Hidaya* above quoted.* Authority.

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* The meaning of the illustration relative to the doctrine of *Tyummum* requires, perhaps, to be explained. The Canonical Law of Moohummud enjoins the use of sand or earth, where water is not procurable, for the purpose of purification; and it also enjoins that, as soon after as may be practicable, ablution be performed, and if an opportunity of performing this be neglected, the previous purification by *Tyummum* becomes useless. Now in the case first put, as each of the persons who had performed *Tyummum* had severally an opportunity of ablution, which, by the permission of the proprietor, each was at liberty to use, their previous purification by *Tyummum* was rendered of no avail, there having been a sufficiency of water for any one of them to have used; but in the case secondly put, the gift not defining the respective shares of each, was null; and even admitting it to hold good, no one of the donees was competent to use it; the gift having vested in them all collectively, and there not having been a sufficiency of water for the use of the whole of them.

CHAPTER VI.

PRECEDENTS OF MARRIAGE, DOWER, DIVORCE AND PARENTAGE.

CASE I.

Q. 1. A woman, for a pecuniary consideration, executes a written agreement, that she will marry her daughter (aged only three months at the time of the agreement) to the son of another woman, and takes the son into her house accordingly, and educates him. Afterwards, the mother of the daughter departs from her agreement, and refuses to permit the ratification of the contract. Under these circumstances, has the mother of the son a legal right to compel the mother of the daughter to fulfil the contract; or can she recover from her the money given in consideration of the agreement of matrimony?

Promise of marriage cannot be legally enforced.

R. 1. The mother of the son has only a legal right to the money paid by her in consideration of the marriage, and she will recover the whole amount so paid. According to the doctrine contained in the *Futawa Kazee Khan*,—"A person solicited the daughter of another in marriage and sent her presents. The father of the daughter afterwards refused to fulfil the marriage contract. In this case it has been ruled, that whatever was sent as dower, or in consideration of the marriage, whether forthcoming or not, must be restored, and that whatever was sent as a present must be restored if forthcoming, but that, if lost or destroyed, it is not claimable as a debt."

Q. 2. A woman solicits the daughter of another in marriage for a boy educated under her care, and gives, or sends to the house of the girl's parents, jewels,

ornaments, clothes and the like. In such case, is the marriage contract complete and binding; and if not, is she legally entitled to recover the property which he had given?

R. 2. In such case the contract of marriage is not binding and complete, because declaration and consent by the parties are requisite to give the contract validity. Under the circumstances stated, the required declaration and consent do not appear to have taken place. But whatever was given to the parents of the girl solicited in marriage, or sent to their house in consideration of marriage, is legally recoverable. According to the *Mokhtusur Ooshafee* cited in the *Futawa Masoomee*,—" A man sent to the father of a girl whom he had solicited in marriage, gold, silver, clothes, or other property, or made him a present of some articles and repeated his presents (as is customary in modern times). A contract of marriage is not thereby executed, because marriage is legally contracted only by declaration and consent, which do not appear here to have existed." So likewise in the *Dustoor-ool Koozaut.* A passage in the *Futawa Kazee Khan* is to the following effect: " A person solicited the daughter of another in marriage, and sent her presents, &c. (above cited).*

Any thing given in consideration must be restored.

If gratuitously given must be restored if forthcoming.

CASE II.

Q. Is it customary on occasions of marriage to enter into any written agreement; for instance, a man betroths his son to the daughter of a dancing woman, and that woman, having paid a certain sum of money, takes a written engagement from the father of the intended bridegroom, specifying that he had received the money and agreeing to the marriage of her daughter with his son, for such pecuniary consideration. If the person engaging should, notwithstanding this written obligation, and the fact of his having kept his intended

* Vide App. Tit. Mar. 18.

daughter-in-law in his house, omit to perform the promise therein contained, can such obligation be considered equally binding as in a case of regular sale? and would the Law recognize it as worthy of being enforced?

A written engagement to marry is not binding, but any sum paid in consideration is recoverable.

R. Among the respectable part of the community written engagements are never entered into on such occasions. It may be customary among the inferior classes, but if any one, for a pecuniary consideration, should execute an obligation of the nature described in the question, it merely amounts to a promise of giving in marriage, and by no means amounts to an actual contract of marriage; and the person executing such obligation is at liberty to depart from the terms of it, and to procure the marriage of his son with any person whom he may think fit, but, if demanded, he must refund the pecuniary consideration received. The conditions of a contract of sale are defined and specific, but no one of those conditions is found to exist in a contract of the nature here alluded to.*

CASE III.

Q. A man causes a contract of matrimony to be entered into between his son and his niece, without the consent of her mother, and at a time when they were both only three years of age. But the son and the niece, during their childhood, imbibed the milk of the

* In this case the contract may be said to have been a *Hibba-ba Shurt-ool Iwuz* or gift on stipulation, which, in its effect only, resembles a sale, and until the consideration be received, the property parted with on one side may be held to be of the nature of a pure gift, which admits of resumption when forthcoming; or it may be held to be property parted with for a valuable consideration, of which, if itself not forthcoming, the price must be restored. In one of the cases propounded in the preceding question, of the gifts having been made simply as presents, without reference to any consideration, they would be resumable if forthcoming only, under the general Law of revocation of gifts.

Vide App. Tit. Mar. 18.

same woman. Under these circumstances is the marriage conformable to Law?

R. It merely appears from the question, that the son and niece, at the same period, during their childhood, imbibed the milk of the same nurse, but their respective ages at the time are not specified. The Law makes a distinction as to the validity or invalidity of a marriage between parties who have imbibed the same milk, depending upon their respective ages at the time they did so. If the parties imbibed the milk of the same woman, on or before their attaining the age of thirty months or two years and a half, their subsequent intermarriage will be illegal; but, if at a time subsequently to their attaining that age, it will be legal. So also if the age of one of the parties may have exceeded, and that of the other fallen short of, the prescribed age at the time of their being suckled by the same woman, the circumstance will be no impediment to their marriage.*

Marriage how voidable by fosterage.

CASE IV.

Q. A person, with a view to avoid the disgrace of having fornication imputed to him, marries a pregnant woman before her delivery: but the woman continues to remain in the house of her parents. She now comes forward and claims from her husband arrears of alimony for six years. The witnesses brought forward depose to the marriage having been celebrated sixteen or seventeen years ago, and it is also proved that the wife never lived with the husband, nor received maintenance from him. Under these circumstances, is such marriage

* It is a general rule that any marriage which is prohibited by reason of consanguinity, would equally be prohibited by reason of fosterage, but there are two exceptions to this rule, for which see Prin. Marriage, &c., 23.

Vide note at page 59.

valid ? and has the wife a legal title to any arrears of alimony, claimed at a period of sixteen or seventeen years subsequent to the celebration of the marriage ?

Of marriage with a pregnant woman and of cohabitation.

R. By Law, marriage with a pregnant woman is permitted, but cohabitation is prohibited until after delivery, if the pregnancy was by any other than the husband. According to the *Hidaya*,—" A man may lawfully marry a woman pregnant by whoredom ; but he must not cohabit with her until after her delivery." Arrears of alimony are not claimable from a husband, unless by stipulation or by a judicial decree. According to the *Viqaya*,—" Maintenance for a past period is not due, unless awarded by order of the Kazee, or stipulated between the parties, in which case the payment becomes obligatory."

CASE V.

Q. A woman, on the occasion of her marriage, received, as a gift from her mother, eighty beegahs of land, a dwelling house and a cow house. She afterwards died, leaving a husband, an unmarried daughter and a son. Now to what proportions of the above specified property will her husband and her two children be entitled on her death ?

The wife's property does not vest in the husband by marriage.

R. According to Law, a woman is absolute proprietor of all property, real or personal, whether acquired by her on the occasion of her marriage or otherwise, and therefore, when she dies, it will be distributed, according to the Law of Inheritance, into four equal shares, of which her husband will take one, her son two, and her daughter one share.*

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* The Moohummudan doctrine in this, as in most other points, more nearly resembles the Civil than the English Law. One of the most familiar instances of confusion taking place according to the English Law, is the marriage of the debtor and creditor, by which, as a general rule, the respective rights and obliga-

CASE VI.

Q. Is a married woman competent to dispose of her jewels, wearing apparel and other effects, by gift to a stranger, or does the Law require that she should previously obtain the permission of her husband?

A married woman has unlimited power over her own property.

R. A married woman is competent to dispose of her own effects by gift, whether they consist of jewels or other articles. The Law does not require the permission of the husband.*

CASE VII.

Q. 1. A Moosulmaun, after having a son and daughter by his first wife, marries a European woman, having converted her to his own faith. Is such second marriage good according to Law?

Of th[illegible] religion [illegible]d num- ber o[illegible] wives.

R. 1. Such marriage is good, because the woman was converted to the Moosulmaun religion, which permits of four wives.† A man may have four wives at the same time.‡

Q. 2. The claim of the first wife, on account of dower, having been satisfied by the husband, and she having given an acquittance for the same, they mutually dissolve the marriage. The husband, notwithstanding that his son and daughter by his first wife are alive, disposes of all his property, real and personal, by gift,

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tions become mutually extinct, and do not survive upon the death of either of the parties. The Civil Law admitting a separation of property between husband and wife, the same consequence did not ensue. *Evans on Pothier, Number XIV. of Confusion or Extinguishment.*

* See Note to preceding Case.

† See Prin. Marriage, &c. 8.
Vide App. Tit. Mar. 12.

‡ Whether the woman was converted or unconverted is a matter of no consequence as far as regards the legality of the marriage. See Prin. Marriage, &c. 12.

in lieu of dower, to his second wife, without the knowledge of his children. Is such gift valid according to Law?

A gift of all the property to a second wife is good though there are children by a former marriage.

R. 2. Under such circumstances, the first marriage being dissolved, the husband is competent to make a gift of the nature described in the question, and the gift will be complete on the second wife's taking possession, because the husband has absolute authority over his own property. His son and daughter would inherit after his death, but not during his lifetime.*

CASE VIII.

Q. A person, previously to contracting a marriage, makes a verbal agreement with his wife, conditioning that, after marriage, she shall be at liberty to live in the house of her parents. After the consummation, is he competent to infringe this agreement by removing her to any other place, or is it incumbent on him implicitly to fulfil its condition?

Of marriage with an illegal condition.

R. According to the Moohummudan Law such an agreement is illegal, and therefore it is not incumbent on the husband to abide by it, and he has full power to carry his wife to his own house, provided he shall have paid the amount of her dower; but, in the event of his not having done so, she is at liberty to object until the amount is paid.†

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* In this case it should be remarked, that the fact of the first wife's dower having been satisfied, is expressly stated; otherwise her children would have had a lien on her husband's property to the extent of the dower due to her.

† It is a general principle in the Moohummudan Law that any illegal conditions annexed to a contract, may be infringed without affecting the validity of the contract itself. They are considered void *ab initio*, or rather as if they had never been made at all. See this rule recognised in Prin. Sales 16, and Prin. Wills 9 and Prin. Claims 8.

CASE IX.

Q. A person, for some pecuniary consideration, executes a written agreement, that he will marry his daughter to the son of another woman. The mother of the son receives the girl into her family, and her son dies before the marriage was legally solemnized. Under these circumstances, has the father of the daughter the right of disposing of her in marriage to another person, or the mother of the deceased?

Right of a girl betrothed, on the death of her intended husband.

R. According to Law, the mother of the deceased person, with whom the marriage of the girl was intended, but not solemnized, is not entitled to dispose of her in marriage. The father of the daughter is at liberty to give her in marriage to some suitable person, and if she be discreet and adult, she is in every respect authorized to enter into a marriage with a person of equal condition, as is admitted by all authorities.

CASE X.

Q. If A, having married B, should afterwards marry her uterine sister C, during the lifetime of B, and if such second marriage should be invalid according to Law, will the first marriage nevertheless hold good and will B be entitled to dower?

Of marriage with a wife's sister, the first wife being alive at the time.

R. The marriage of a A with B will stand good, notwithstanding the fact of his having subsequently married her uterine sister C. As C however, by reason of her affinity, falls within the prohibited degrees of relation, her marriage with A is null and void, and she is not entitled to dower; but this fact does not invalidate the prior contract with B, and,

on the death of A, his wife B will be entitled to the full amount of her dower out of his estate.*

CASE XI.

Q. 1. What words and what forms are necessary to constitute a marriage?

Ceremonies requisite to marriage.

R. 1. To constitute a marriage, words of proposal and acceptance are absolutely necessary on the part of the contracting parties; for instance the husband himself says,—"I have married such a woman on such a dower," and the wife says,—"I have agreed," or the agent of the wife may say,—"I have given such a woman in marriage to such a man for so much dower," and the agent of the man may say,—"I have consented on behalf of such a person." It is likewise a condition,† that two men, free, sane, adult and Moosulmauns,‡ should be present at the place of the contract, in order to witness the proposal and acceptance, or one man and two women of the above description. The feasting, entertainments and other preparatory ceremonies are merely customary forms, which are by no means essential to the contract.

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* Had the two sisters been married by the same man at the same time, or had the priority of one or the other marriage not been ascertainable, they would both have been invalid. This supposes the former wife to be alive and the marriage not to have been dissolved. There is no objection in the Moohummudan Law to a man's marrying the sister of his deceased or divorced wife. The above doctrine is contained in the *Moheet-oo-surukhsee* cited in the *Futawa-i-Aulumgeeree*. Vide App. Tit. Mar. 11.

† This doctrine would at first sight appear inconsistent with that laid down in the case of Mirza Jaun and others (vide Precedents of Marriage, Note to Case XLVII.); but in reality they are perfectly reconcileable. The doctrine in that case was that hearsay evidence is sufficient to prove a marriage; but then it is presumed that the marriage was legally performed in the presence of witnesses, as required by the doctrine in this case. The answer to the second question tends also to establish this point.

‡ Objections as to character and relation do not apply to witnesses in a contract of marriage, as they do in other contracts. Prin. Marriage, &c. 5.

NOTE.—For information respecting the forms and ceremonies attending betrothal and marriage vide the Qanoon-e-Islam or the Customs of the Moosulmauns of India, by Dr. Herklot of the Madras Establishment, published in London in 1832. This work treats of the Customs of the Soonnees. "The observations on the Moosulmauns of India by Mrs. Meer Hassan Ali, published in the same year, treats of the customs and opinions of the Sheeas."

Vide also Appendix wherein the ceremony of marriage is described.—ED.

Q. 2. What description of evidence is necessary to establish a marriage?

R. 2. Witnesses should have ocular proof in all instances, except in cases of parentage, marriage, and certain other special cases, in which hearsay testimony is allowable,* provided that the witness has a thorough belief of the fact either from its notoriety, or from information communicated by another, whose veracity he has no reason to suspect. This is according to the *Hidaya*. Hearsay evidence when admissible.

Q. 3. Can Moosulmaun lawfully enter into the state of matrimony with his slave girl?

R. 3. The marriage of a Moosulmaun with his slave is useless and inoperative, because the legality of enjoyment is as much secured by the right of property, as it could be by a contract of marriage; but the practice has nevertheless been recognized as proper in modern times, on a principle of caution and moral dread; because it is universally admitted, that she only is, strictly speaking, a slave who has been captured in an infidel country, or who is a descendant from such captive; but as to slave girls, in the popular acceptation of the term, such as those purchased in times of famine and scarcity by Moosulmauns and others, the legality of enjoying them is denied. It is, therefore, preferable to contract matrimony with such persons, for the purpose of legalizing the enjoyment of them. Legal definition of slavery.

Q. 4. A Moosulmaun marries his four slave girls, and afterwards, during the lifetime of all four of them, enters into matrimony with a free woman. Is such fifth marriage legal and valid?

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* See Prin. Claims. &c. 14.

Of marriage with slaves.

R. 4. If it be established that a Moosulmaun did marry four woman, who are, strictly speaking, his slaves, his marriage with them is null and void, and his subsequent marriage with a free woman is not in reality a fifth marriage, and it is a good marriage, during the lifetime of the slaves; but if the four women are not strictly and legally his slaves, but merely pass as such according to the popular acceptation of the term, marriage with them is permitted by law, and a subsequent marriage with a fifth woman, is a fifth marriage, and consequently invalid;* but dower is due after the consummation of an invalid marriage, and in such case, of the proper dower and the stipulated dower, that which amounts to the smaller sum must be paid by the husband. So also the parentage of the offspring of an invalid marriage is established in the husband.

Of dower and parentage in an invalid marriage.

CASE XII.

Q. An adult woman entered into a contract of marriage with an individual, by her own free will and consent, in the presence of witnesses; afterwards, her relations having forcibly carried her away from the house of her husband, disposed of her in marriage to another individual. Both the husbands now sue for possession of the woman. Each party has witnesses to prove, the one, that the marriage was duly solemnized on the fifth, and the other that the marriage was celebrated on the eighth of the month of *Ramzaun* of the same year, with them respectively. The second claimant contends that he married the woman after her divorce. The woman and her relations wish to uphold the second marriage. Under these circumstances to which of the two claimants does the woman lawfully belong, and is

* But, had the person alluded to in the question, married only one female slave the property of another individual, he could not subsequently have married a free woman. See Prin. Marriage, &c. 11.
Vide Appendix Tit. Mar 10.

it essentially necessary, to establish the fact of a marriage, that the person by whom the ceremony was performed should give evidence as to the fact of its solemnization ? and is it requisite to the validity of a marriage that the woman and her guardians should approve of it ?

R. It is proved, by the testimony of witnesses, that the marriage of the first claimant took place before that of the second claimant, and it is therefore entitled to preference by reason of such priority.* The woman should, therefore, be delivered into the possession of the first claimant, as is laid down in the *Hidaya*,—" If they should specify dates to the marriage, the evidence of that party which specifies the prior date must be preferred." So also in the *Shurhi Viqaya*,—" If two persons lay claim that they married a woman one after the other, and adduce witnesses to the fact of their respective marriages, he who was prior in point of time should be preferred." The second claimant himself pleads, that he married the woman after she had been divorced by her first husband, but such second marriage must be considered null and void, because, during the period of *edit* or term of probation, her contracting a second matrimonial engagement is illegal ; and it is not possible that, between the fifth and eighth of the same month, the necessary period should have elapsed. But if it be believed, that the first claimant really did divorce the woman, and it be proved that, although the divorce was reversible, he did not return to her, or that it was irreversible, in that case the marriage of the first claimant also becomes null and void. If, on the contrary, the woman does not prove a divorce, and the marriage be established by competent witnesses, she should be, re-

A claimant pleading that he married a woman after her divorce, is sufficient proof of a former marriage as against him.

Of a second marriage during the term of probation.

* See Prin. Claims, &c. 4.

turned, to the first claimant. After proof of marriage, the approbation of herself, or of her guardians, is a matter of no consequence, unless on the ground of inequality or other legal disqualification, which may have been decided to be a sufficient reason for the dissolution of a marriage contract.*

CASE XIII.

Q. Musst. Hinda and Zeyd lived together as husband and wife for a period of fifty-five years, and, on account of such a length of time having elapsed, there is no person in existence who witnessed the celebration of the marriage, but the acknowledgment of the marriage of Hinda, as made by Zeyd, may be proved by the testimony of witnesses and by documents. Under these circumstances is the marriage, according to the Moohummudan Law, established or not? If, according to the circumstances above stated, the marriage is complete and binding, in what proportion is the widow entitled to inherit after the satisfaction of her claim of dower?

The proved acknowledgment of the husband's sufficient to establish a marriage, in default of better evidence.

R. If Zeyd lived in the same house with Hinda, and they cohabited as husband and wife for the space of fifty-five years, or if Zeyd acknowledged his marriage with Hinda before witnesses, this acknowledgment is sufficient in Law to establish the marriage. In case Zeyd died childless, his widow will be entitled to inherit one-fourth of his estate, and in case of his leaving a child, one-eighth; and if no specific sum be proved to have been stipulated as dower,† she should be allowed her *muhr-misl* or proper dower; the payment of dower being incumbent on a husband in like manner as the

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* For the Rules relative to Divorce, See Prin. Marriage, &c. 24 and 25, and for those relative to the interference of Guardians, see ibid. 14, 15, 16, 17, 18, and 19. Vide also App. Tit. Mar. 13.

† Vide Case XLIII wherein a widow under similar circumstances was declared not entitled to dower.—Ed.
Vide also Appendix Tit. Mar. 1.

payment of his other debts. Heirs are not entitled to inherit the assets until the debt of dower is liquidated.*

CASE XIV.

Q. Is the marriage of an infant daughter, whose father's uterine brother is living, valid and lawful, without the consent of her uncle, but with the consent of her mother, maternal grand-mother and maternal grand-father?

Of marriage in the absence of a legal guardian.

R. The consent of the uncle cannot be dispensed with, unless he is at a distance of three days' journey, in which case the marriage is good with the consent of the relations above specified.†

CASE XV.

Q. Supposing equality of condition in life between the parties, is the marriage of Asud Ali, son of Meerun Khan, with Musst. Imamun, valid, without the consent of her uncle, Ali Moozuffer Khan?

Of the paternal guardians, power over the marriage of an infant.

R. In the event of the bride being a minor and not adult, the contracting her in marriage rests with her guardians. Her guardians are her paternal relations, according to their proximity in the order of inheritance. A father's brother is among this description of relations. It is allowable for him to contract the infant in marriage, but she, on attaining the age of majority, has the privilege of dissolving the contract. So long as she may continue a minor,

* In this case, it is true, that besides the acknowledgment of the husband there was evidence of continual cohabitation, but either fact, duly established, would be sufficient to prove the marriage.

† Where there is no paternal guardian, the maternal guardian may dispose of an infant in marriage. See Prin. Marriage, &c. 19. For what constitutes such a distance as may be termed a three day's journey, see Precedents of Gifts, Case 9 page 206.

it behoves the person who is entitled to the care of her, to prohibit her from going to the house of her husband, except when the husband of the minor pays her prompt dower. The authorities for this doctrine are in the *Buhr-oo-rayuq* and *Aulumgeeree,*—"If an infant be married, and desire to go to the house of her husband, without having received her dower, it behoves the person who had charge of her previously to marriage, to restrain her, until he who is entitled thereto has received on her behalf, her full dower." "When an uncle contracts the infant daughter of his brother in marriage for a specified dower, and delivers her to her husband, before taking the full amount of her dower, the delivery is improper, and she may be taken back to her own house." The marriage of a free adult and discreet damsel with a man equal in condition of life is good and valid, without the permission of her guardian; but the guardian may object, if there be not equality between the parties. And if a damsel being of sound discretion, though under age, contract herself in matrimony to an equal, and afterwards the guardian allow the marriage, it will be good; still she has an option on attaining majority. If she have no guardian, the validity of the contract will entirely depend on the pleasure of the minor when she shall have attained majority, as appears from the *Aulumgeeree,*—"*Kazce Budeeooddeen* was interrogated respecting an infant damsel, who contracted herself in marriage with her equal, having no guardian, and there being no *Kazee* present at the place. He answered: it is contracted, and depends on her pleasure after majority."*

They should enforce payment of dower.

Of the marriage of an adult woman, if the match be equal.

And if unequal.

And of a minor, if guardians consent.

And where there is no guardian..

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* But she must declare her desire of annulling the contract immediately on coming of age. Otherwise, if she continue to live with her husband for any period subsequent to her majority, her right of effecting the dissolution of the marriage ceases. See Prin. Marriage &c from 14 to 19.

Vide App. Tit. Mar. 15.

CASE XVI.

Q. Does it appear from the evidence in this case that Lootfoonisa was legally married to Kubeerooddeen? If so, has Lootfoonisa, after she shall have attained the age of majority, a right to annul the marriage? Does it appear from the parties being connected by fosterage, or any other disqualifying cause, that the marriage should be considered null and void: and if the marriage was contracted in every respect strictly according to Law, and there should be no cause to avoid the same, is it requisite that Lootfoonisa should be made over to her husband, or should the care and protection of her be entrusted to her relations during her minority?

R. It appears from the evidence in this case that the marriage was legally contracted; but a woman has the option of annulling the contract of marriage, on her attaining the age of majority. If Lootfoonisa has not yet attained the age of majority, that is to say, if the signs of puberty have not appeared, she may, on her attaining that age, annul the marriage.* But if having attained the age of majority she remain silent, and do not immediately have recourse to judicial process, for annulling the contract, she will be left without option, and the marriage cannot subsequently be annulled by her. If it be proved that the parties are connected by the tie of fosterage, the marriage is null and void; but the fact is not sufficiently proved in this case. (Here follows a recapitulation of the evidence against the plea of fosterage.) Supposing Lootfoonisa not to have attained the age of majority, her mother is entitled to the charge of

Of a woman married while a minor.

Of fosterage.

Of a mother's right of guardianship.

* A girl, however, who has been married during her minority by her father or by her paternal grand-father, is not at liberty to annul the contract on coming of age. She is only competent to do so, when the marriage may have been contracted by herself, or by some distant guardian on her behalf; that is by any other than the father or grand father. See Prin. Marriage 18.

her, and she is at liberty to prevent the husband from removing her daughter to his house, until he shall have paid so much of the dower as may have been stipulated to be paid promptly.

CASE XVII.

Q. If a girl, of eleven years of age, enter into a contract of marriage, of her own free will and choice, without the consent and approbation of her mother or other guardians, is such marriage available in Law or not?

Circumstances under which minority ceases.

R. The answer to the question entirely depends on the fact of the girl's being adult or otherwise. If a girl exhibit certain signs of womanhood at the age of nine, ten, eleven or up to fourteen years old, she is, in the language of the Law denominated *baligha bilulamut* or adult by puberty. Should she exhibit none of those signs up to her fourteenth year, yet, on her attaining the age of fifteen years, she will be deemed an adult, and in the language of the Law will be termed *baligha bissin* or adult by majority. Under these circumstances if the girl alluded to in the question, being eleven years of age, should have shown signs of womanhood, she will be technically denominated *baligha bilulamut*, and will be at liberty to contract marriage with a person either her equal or inferior in condition, without the consent of her mother or other guardian. Such marriage is available in Law; in other words the contract does not infringe any positive legal rule. The mother or other guardian is not authorized to prevent the match, if she enter into a contract of marriage with a person equal in point of condition; but, if he be her inferior, they have a right to come forward and cause it to be set aside. In case of any doubt existing as to whether a girl has exhibited certain signs of womanhood, she

An adult girl may marry her equal without consent of guardians.

But if inferior guardians may interfere.

should be questioned as to the fact; and if she reply in the affirmative, she should be treated as an adult, otherwise as a minor; and, if the fact cannot be ascertained from her declaration, she should be considered as not having passed the age of minority, and in both the last mentioned cases, if, without the consent and approbation of her mother or other guardian, she should have contracted matrimony either with her equal or her inferior, the marriage is good in Law; in other words, the contract does not infringe any positive legal rule: but her mother or other guardian has, at any time,* a right to come forward and to cause the marriage to be set aside.

Evidence of puberty.

The guardians may set aside a minor's marriage, whether with an equal or an inferior.

CASE XVIII.

Q. 1. A girl having attained the age of twelve, of thirteen, or of fourteen years, asserts that she has arrived at the age of puberty. Is such assertion to be credited or otherwise?

R. 1. An assertion either by a male or a female of their having attained the age of puberty, after they are twelve, or thirteen, or fourteen years old, should be credited and received as conclusive, according to the *Viqaya*,—"If they are adolescent and shall assert their puberty, they must be believed and treated as persons who have arrived at the period of puberty,"†

Assertion of puberty when admissible.

Q. 2. If the mother of such a girl as that described in the preceding question, should claim the charge or custody of her, is such claim admissible?

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* That is at any time before the birth of a child. After she has borne a child to her husband the Law will not permit of any interference on the part of the guardians, to set aside the contract. Such is the doctrine contained in the *Kifaya*. See Prin. Marriage, &c. 14, 15, 16, and 17.

† Vide App. Tit. Infant. 1.

Mother's guardianship when determinable.

R. 2. The mother has no right to the charge or custody of her daughter under these circumstances; because the mother and grand-mother are entitled to the custody of the daughter, only until the period of puberty, according to the *Viqaya*,— The mother and the grand-mother have power over the daughter until she menstruates."

Q. 3. Is such a girl as that described in the preceding question, at liberty to dispose of herself in marriage without the consent of the mother; she having lived apart from her mother from the time of her childhood?

An adult woman may contract herself in marriage.

R. 3. The marriage of a girl arrived at puberty, depends entirely on her own inclination. She is not dependant on the will of the guardian who has the greatest power, much less on that of the mother; according to the *Viqaya*,—" The marriage of a free woman possessing mature judgment, is valid without the consent of a guardian, although contracted with one not equal in point of condition.*

Q. 4. To what period does the Law allow a mother to retain any power over her daughter, and on what particular occasions does it admit the exercise of the

* This doctrine, however, maintaining the validity of a marriage, is not to be understood as absolutely precluding all right of interference on the part of the guardians under any circumstances; on the contrary they are expressly authorized to interfere in the case of a marriage contracted by such a woman with a person not being her equal in condition of life. See the Law as laid down in the case of Ali Moozuffer Khan versus Wulee Khan and others, page 264, Case 15.

The distinction between the case of a female who has attained the age of puberty contracting marriage, and one who has not attained that age, is, that in the former case the marriage is valid, but voidable by the guardians where inequality appears, and that in the latter case the contract is void *ab initio* if entered into without the consent of the guardians; but such consent may be implied as well as express.

Vide App. Tit. Mar. 15.

power? How long does the right of custody continue, and can the mother retain it over a daughter who asserts that she has attained the age of puberty?

R. 4. The power of a mother over her infant daughter merely extends to the exercise of her right of custody, and the right of custody continues from the time of giving milk to the time of menstruation.* Mother's guardianship wherein consisting.

CASE XIX.

Q. 1. A person died, leaving a wife, and a son by that wife, and a son by a slave girl to whom he was not married, who was the slave of another person, and who had been before married to the slave of a third person. After his death, the son by his wife took possession of all the property, and he also dying, his mother succeeded to a part of the estate, the rest being taken by the son of the slave girl abovementioned. Under these circumstances, has the last named person a right to succeed to any part of the inheritance; and if so, to what proportions are he and the widow of the original proprietor respectively entitled?

R. 1. According to Law, the son of the person by the slave girl, to whom he was not married, who was the slave of another person, and who had been before married to the slave of a third person, cannot be considered as the legitimate issue of that person; nor is he entitled to inherit any part of the property. His having taken any portion of the estate is illegal. The entire property belongs of right to the married

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* The reply to this question supposes that there are paternal relations; but where they do not exist, the power of giving away her daughter in marriage is vested in the mother.

woman and her issue by the deceased. Authorities,—"To establish the parentage of a child begotten on any woman, it must be proved that she is the *consort** of the imputed father." It is laid down in the *Shurhi Viqaya* in the chapter treating of *post obit* manumission and of claim of parentage that, "there are three descriptions of *consorts;* inferior, secondary, and principal. The inferior *consort* is a female slave, the parentage of whose offspring is not established in her master, until he claim it; but, when the master claims the parentage, the female slave becomes an *oom-i-wulud,* which is the secondary description of *consort,* the parentage of whose offspring is established in the master without his making claim, but whose offspring may nevertheless be disclaimed by the simple denial of parentage on the part of the master. The principal *consort* is the married woman, the parentage of whose offspring is established without any claim on the part of the husband, and whose offspring cannot be disclaimed by his simple denial of parentage, nor without recourse to imprecation." The woman described in the question does not come under any one of the three descriptions above enumerated, and consequently the deceased cannot be considered as the parent of her offspring; but they should be accounted the children of the slave to whom she was espoused. The widow is entitled to an eighth, and the son, as residuary, to the remainder, as is laid down in the *Sirajya,*—"An eighth with children or sons' children in any degree of descent." "The offspring of the deceased are his sons first, then their sons in how low a degree soever."

Three descriptions of *consorts.*

Parentage of their offspring how severally established.

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* I have used the term *consort* as appearing to me the most appropriate English term by which the word *firash* can be rendered. Meninski translates it,—"*Lectus grabbaton et per metaphor mulier conjunx.* The term "*concubine*" is too ignominious in its ordinary acceptation, though, perhaps, taken in its strict sense, the translation would be more accurate.

Vide Case VII, Precedents of Slavery.—Ed.

Q. 2. Supposing the slave girl above mentioned to have been the property of the imputed father, though before married to the slave of another person, will this fact make any alteration in the case?

R. 2. The fact stated does not make any alteration in the case. The child in question will still be considered the son of the man to whom the slave girl was espoused. It is stated at the end of the fourth chapter of the *Foosool-i Imadeeya*, that "the parentage of children of a female slave is established in the husband of such slave, and not in her master, even though her master should claim them;" and the reason is that the inferior *consort* cannot be put in competition with the principal one.

The master of a married female slave cannot be considered the parent of her offspring, even though he claim them.

CASE XX.

Q. Two persons contract matrimony with each other, at a period when the bridegroom was only ten years old, and the age of the bride did not exceed eight or nine years. On the occasion of the celebration of the marriage, the bridegroom, in the presence of witnesses, orally made a settlement on his wife of several thousand rupees, which he engaged to pay her. Some time after the marriage, the husband and wife disagreed, and the latter retiring to the house of her father, some years after brought an action against the former, on the plea of his having divorced her. Under these circumstances is the sum which the defendant acknowledged *ore tenus* in his minority, to be due on account of dower, recoverable from him or not?

R. Under the circumstances stated, the sum which the defendant, during his minority, acknowledged to be due on account of dower, is not recoverable from him; because the acknowledgment of a minor is not legally

Dower fixed during the minority of the husband not recoverable.

binding, unless the marriage of the minor was contracted with the consent of his guardian, and unless the sum agreed upon as dower, was fixed conformably to his directions: in which case, if complete retirement took place after puberty, the whole amount specified as dower is claimable, otherwise the husband is compellable to pay half the amount only. Divorce by a minor has no legal operation, as is laid down in the *Hidaya*. The divorce of every husband is effective, if he be of sound understanding and mature age, but that of a boy or a lunatic, or one talking in his sleep is not effective, because the prophet has said,—"Every divorce is lawful excepting that of a boy, or a lunatic, or of one talking in his sleep." A question was put to *Cazee Budee-oo-deen* respecting a girl under age, who had contracted herself in marriage, having no guardian and there being no judicial authority at the place. He replied that the contract was suspensive, and would become valid by her consent, after her attaining the age of puberty. Such also is the doctrine contained in the *Buhr-oo-rayiq*.

Of persons incompetent to pronounce divorce.

CASE XXI.

Q. A person, being on his death-bed, but in the full enjoyment of his senses, acknowledged that he was indebted to his wife in a certain sum. He executed an obligation to that effect, reciting that the deed of dower, specifying the amount that was stipulated, had been lost, and he moreover executed a deed of gift in favour of his wife, making over to her his entire property, in lieu of the dower claimable by her. Three or four days afterwards, he died of the sickness with which he was afflicted. Under these circumstances, are the obligation and deed of gift above alluded to good and valid according to Law or otherwise?

R. According to Law, the acknowledgment of a man, on his death-bed, in favour of heirs, is null and void; and a wife is an heir. But, should a man, in his last sickness, acknowledge a debt to be due to his wife on account of dower, the acknowledgment will be good to such extent of the property as amounts to her proper dower, or such as it has been customary for her equals in condition to receive, but to no more. A gift, on a death-bed, without delivery, is totally null and void.

A death-bed acknowledgment of dower will not avail for more than the average sum.

CASE XXII.

Q. A woman claims from her deceased husband's estate the sum of one lack and twenty-five thousand rupees, alleging that to be her proper dower and the amount usually settled on her female relations. Two witnesses to the marriage, adduced by her, state that twenty-five thousand rupees and two gold mohurs was the sum fixed as dower. Under these circumstances, is the widow entitled to receive, in satisfaction of dower, the amount stated by the witnesses as due, or that which she alleges to be her proper dower?

R. It appears, that the claimant states her proper dower at one lack and twenty-five thousand rupees, but two of the witnesses, who were employed as agents in conducting the negotiation of the marriage, and who were invested by both parties with full powers, declare that the sum of twenty-five thousand rupees and two gold mohurs was fixed as dower. Consequently her claim, supposing the witnesses to be unexceptionable, is good for that sum, and no more. The sum to which she is entitled, as stated above, is termed in the language of the Law *express* dower, while that which she claims as her *proper* dower is termed *unknown*; and it is frequently found difficult to ascertain its amount with any degree of precision.

Where dower has been *expressly* fixed, there is no right to the *proper* dower.

CASE XXIII.

Q. 1. A Moosulman dies, leaving moveable property in the hands of his widow. Now his creditors desire to realize their debts out of his estate, and his widow, in opposition to them, sets up a claim of dower. Under these circumstances, supposing the property left to be insufficient to liquidate all the debts and the claim of dower, what is to be done? Is the claim of dower, to be considered preferable to the claims of other creditors, or should they be considered to be on an equality, and a *pro ratâ* distribution made among all the claimants, or in what mode?

No distinction between claims of dower and of other debts.

R. 1. The claim of the widow for dower, payable out of her deceased husband's estate, is just, and the claims of the other creditors, for the payment of their debts out of the estate, are also just. Under these circumstances, after the ascertainment of the amount of the dower and of the sum due to the creditors of the deceased, the whole property, moveable and immoveable, must be collected, and it must be examined, with a view to find out whether or not it is sufficient to satisfy all the claims. If so, it must be appropriated in that manner and if not, each person must get a proportional share. The Law makes no distinction between a claim of dower and other debts. No preference is given to one description of claim over another, and a *pro ratâ* distribution must be made with respect to all.

Q. 2. According to the Moohummudan Law, how is the right to dower and its amount established; and under what circumstances is it claimable and payable?

Dower proveable like other claims.

R. 2. A claim of dower is established by the same means as other claims, and, when disputed, the proof

consists in evidence. A decision should be passed in favor of the party, who adduces evidence of right. If both the parties, or neither of them, adduce evidence, the proper dower must be paid, that is to say, a dower must be paid equal to the amount received by the paternal aunt or sister of the wife.* The dower becomes due on the consummation of the marriage, or the death of either of the parties, or on divorce. Should the wife not claim the payment of it, during the life-time of her husband, it must be paid to her out of the property left by him on his decease.† When due.

CASE XXIV.

Q. Is the debt claimed by the defendant legally proved, and, if so, the whole of the property, real and personal, of her deceased husband being absorbed in such debt, is it to belong of right to his widow, or is it to be distributed among the heirs generally?

R. It has been proved, by the testimony of three competent witnesses, that the debt due to the defendant from her deceased husband on account of dower, amounted to ten thousand gold mohurs and twenty-five thousand rupees, and a debt legally proved cannot be satisfied but by compromise or liquidation. So long as the debtor lives he is responsible in person, and, on his death, his property is answerable; but there is this distinction between money and other property in cases of dower, namely, that the widow is at liberty to take the former description of property, over which she has absolute power; but as to the other property, she is entitled to a lien on it, as security for the debt, and it does not become her property absolutely, without the consent of the heirs or a judicial decree.‡ Where the debt is large and the Distinction between money and other property in cases of dower.

* See Prin. Claims, &c. 30 and Note. † Prin. Marriage, &c. 20.

‡ Vide App. Tit. Dower 26.

estate small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate.

CASE XXV.

Q. If there be no deed of dower, and the amount thereof cannot be established by witnesses, how much dower will the wife be entitled to receive from her husband?

Dower where no sum fixed.

R. She will be entitled to receive her proper* dower, and if this be not ascertainable, she is by Law entitled to receive ten *dirms*.

CASE XXVI.

Q. A husband assigns over to his wife, by deed, all his property, moveable and immoveable, in satisfaction of her dower; but the wife does not take possession of the property. Under these circumstances, is the ownership of the husband entirely divested, or not?

Seizin not requisite in cases of property exchanged for dower.

R. Under the circumstances above stated, all the property specified in the deed becomes liable for the satisfaction of the wife's dower, whose right thereto is completely established, and the ownership of the husband is entirely divested. In this case, seizin is not a requisite condition. Any valuable commodity may be assigned in satisfaction of dower, provided it admit of identification. †

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* The *muhr misl*, as it strictly signifies, is the average amount received by females of the same family, as their dower. The *minimum* exigible as dower is ten *dirms*. Vide App. Tit. Dower, 13, 21.

† The reason of this opinion is, that an assignment in satisfaction of dower, or in lieu thereof, is not an absolute gift, in which case seizin would be necessary, but rather resembles a sale or an exchange, being a gift for consideration. It is, in other words, a commutation of money for goods, in which case (See Prin. Sale 12) it is lawful to stipulate for future period of delivery; consequently immediate seizin cannot be requisite to the validity of the contract.

NOTE TO CASE XXVI.—Vide Case XXXV, wherein the assignment of

CASE XXVII.

Q. A widow, during the lifetime of her husband, remitted to him the debt due to her on account of dower, (whether such remission be *per se* legal or illegal) is it rendered illegal by her having executed a deed, specifying the remission, contrary to the usage of the country?

R. The remission of dower on the part of a wife is legally correct. It amounts only to making a debtor the proprietor of the debt due from him. The remission therefore being authorized, the deed in which it is specified must be legal, whether contrary or conformable to the usage of the country; for usage, legally speaking, is always inoperative in opposition to that which is sanctioned by Law. The remission however will not be established merely by the legality of the deed, but evidence must be taken as to the fact of the remission; for a deed is available as evidence, but is not conclusive as to proof.

Of remission of dower.

CASE XXVIII.

Q. Supposing a childless woman to remit to her husband her claim of dower, to what proportion of his estate will she be entitled on his decease, the other claimants being a sister and a paternal uncle?

R. After the liquidation of the debts of the deceased, and the performance of other requisite duties antecedent to the adjustment of the claims of inheritance, the estate will be made into four parts, of which the widow will take one as her legal share or a fourth; the uncle one, and the sister the remaining two. The remission

Remission of dower does not affect the right of inheritance.

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the whole of a husband's property in lieu of an *unspecified portion* of dower was declared to be null and void. In this case the *dower* appears to have been *specified*, which circumstance constitutes the difference in the application of the principle. Vide Author's Note to Case XXXV. Also Appendix Tit. Gift 40 and note.—Ed.

by the wife of her claim to dower does not by any means affect her right to the share of the inheritance to which she is entitled by Law.

CASE XXIX.

Q. 1. Is the sum of money stated to be due to the wife in the deed of dower (in which there was no mention made as to whether the payment should be prompt or deferred) claimable by the wife during the lifetime of her husband? and supposing the wife to have died childless before her husband, not having made any claim of dower during her coverture, which lasted for a very considerable length of time, is her brother's son entitled, in right of inheritance, to claim it from the husband, or, after his death, from his representatives? and supposing him to have a just claim on the estate on that account, what portion of the dower should devolve on him in right of inheritance.

Of a deed of dower not specifying whether the payment shall be prompt or deferred.

R. 1. The sum specified in the deed of dower (presuming it to be genuine) was due, in the lifetime of the wife, and during her coverture; that is to say she was at liberty to claim it from her husband. If she omitted to claim it and died childless before her husband, without having compromised or resigned her right to dower, her brother's son is legally empowered, as heir, to claim it from her husband or his representatives; but half of the dower lapses to her husband in right of inheritance, and the other half belongs to the brother's son of the wife, supposing her to have left no other legal sharers or residuaries.*

* This is one of the few cases in the code of Moohummudan Law in which there is so much uncertainty, from the conflicting opinions of equally respectable authorities, that it is difficult to ascertain to which the greater preference should be assigned. There may be a stipulation for prompt payment of dower, or for deferred payment, or there may be no mention whether it is to be deferred or

Q. 2. It appears that the husband and wife mutually executed a will in favour of each other, to the effect that they should be reciprocal heirs, and that, whichever of them died first, the estate of the survivor should not be subjected to any charge on account of the deceased. Now supposing the dower to have been due from the husband up to the date of the execution of the will, and that the wife did not in any other manner resign or compromise her right, is such will sufficient to bar all claims against the estate of the husband on account of dower?

R. 2. The claim on account of dower cannot be extinguished by the will which the husband and wife mutually executed in favor of each other. The husband cannot in any manner be exonerated from the debt of dower, except by its liquidation or by its being expressly given up by the wife, — Dower not extinguished by mutual testament of husband and wife in favor of each other.

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prompt. In the first case and the last the prevalent doctrine appears to be that the whole should be paid promptly. This is the opinion of the compiler of the *Hidaya* and of the *Futawa-i Hummadee*, and they assign as a reason that marriage is like all other contracts, in which, if it be not expressly stipulated that the payment of the consideration shall be deferred, it must be paid immediately as a matter of course; and that dower is the consideration of marriage. The author of the *Shurhi Viqaya* and of the *Futwa-i-Aulumgeeree* (citing *Kazee Khan* as authority) on the other hand, maintain that where no mention has been made of the period of payment in cases of dower, such portion should be withheld* as it may have been customary to withhold until a future period. Payment, according to the more received doctrine, may be deferred to a future period, not ascertained, provided it admit of being reduced to a certainty. For instance it is allowable to postpone the period of the payment of dower till the death of the husband or divorce. This doctrine is held in the *Futawa-i-Alumgeeree* and the *Mooheet Oosurukhsee* is cited as the authority. Other authorities however seem to object to precedent conditions admitting of a great degree of uncertainty as to their occurrence, or as to the period of their occurrence. As dower is claimable without a condition on death or divorce, it is needless to argue with reference to those conditions. But it is reasonable and consonant to the spirit of laws in general, to admit the validity of suspending payment until the husband's death,—"The condition must bear reference to an event which may or may not happen. If it relate to a matter which certainly will happen it is not properly a condition, but is equivalent to a term of payment. Thus a bill of exchange on the death of a person named is valid, being payable on that event as at a term."—*Colebrooke on the Interpretation and Effect of Conditional Obligations, Chap. IV.* § 201.

* Note.—Morley in Dig. Vol. 1 p. 298 reports a Case decided on the 21st August 1805 by the S. D. A., wherein the widow was held to be entitled to two-thirds of the dower claimed. One-third being Muujjil, (or payable on her marriage) was held barred by the rule of limitation, and the remaining two-thirds being Muvvujjal, (not exigible during the continuance of marriage) were held to be payable on the death of the husband which happened only six years before the action. Vide also Cases XXX, XXXII. and App. Tit. Dower 34.

and the sum due on that account is claimable from him during his lifetime, and from his estate after his death.

CASE XXX.

Q. A husband executes a deed of dower in favor of his wife, settling upon her ten thousand gold mohurs and fifty thousand rupees; and specifying that the payment of a *part* should be prompt, and that the payment of the remainder should be deferred. The amount payable promptly is not defined. Under these circumstances, according to Law and the usage of the country, how much of the stipulated dower should be paid promptly and how much deferred until after the death of the husband?

Of dower, the portion payable promptly not being defined.

R. As the deed stipulates a specified amount of dower, there is not such a degree of uncertainty as entirely to invalidate the claim ; but it is stated that a *part* is to be paid promptly, which leaves the amount of the remainder, to be paid at a deferred period, uncertain. According to Law, in such a state of uncertainty, recourse must be had to local usage. This marriage appears to have been contracted at *Moorshedabad*. The practice therefore which obtains with respect to deeds of dower at that and the adjacent places should be followed. In general it is stipulated that the payment of one-third shall be made promptly and that of the other two-thirds deferred ; and it is also usual to stipulate that the payment of one-half shall be prompt, and of the other half deferred. The adoption of the former practice, therefore, is, in this instance, allowable; but the adoption of the latter is in all instances more certainly equitable.*

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* The above rule however was by no means laid down as a principle to be adopted on all similar occasions. The usage of the country is the only legal rule to be observed in controversies of this description. Had

CASE XXXI.

Q. 1. Has a wife a right to oppose the inclination and resist the authority of her husband, before she has received her dower, notwithstanding the previous interchange of conjugal habits, without objection on her part?

Payment of dower being unjustly withheld, the wife owes no allegiance.

R. 1. If it have been stipulated that a portion of the dower is to be paid immediately, she has a right to do so, with a view to obtain that portion of her dower. So also if no mention have been made of the immediate payment of any portion, she may do so, with a view to obtain such a portion, as may be consistent with her situation in life, unless the postponement of the payment of the whole had been expressly stipulated; according to the *Munnih-ool Ghuffar*,—"She is* competent to preclude him from the enjoyment of conjugal rights, or from carrying her on a journey, or removing her from one house in a town to another, (although matrimonial intercourse may have passed between them and the marriage may have been consummated, without any objection on her part,) for the purpose of obtaining a portion, or the whole, of the dower, prompt payment of which was stipulated, or for the purpose of obtaining such a portion of it, as is usually paid promptly to her equals in condition, unless the payment of the whole was expressly postponed: according to *Aboo Yoosuf*,—"She has a right by a favourable construction in this case also; and opinions have been given according to this doctrine on a principle of favourable construction." Such also is the doctrine contained in the *Doorur-i Mokhtar*,—"She is competent to preclude him from

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there been no mention whatever whether the dower should be prompt or deferred, the whole must be considered to be promptly due. See Prin. Marriage, &c 22. This is unquestionably the Law, and the author of the *Shurhi Viqaya* admits it to be so, although he states that occasionally, in modern practice, respect is paid to the peculiar usages of the place in which the cause of action may have originated.

the enjoyment of conjugal rights; and according to *Aboo Yoosuf*, even although the payment of the whole dower was expressly postponed. Opinions have been given according to this doctrine on a principle of favourable construction." Therefore, before the dower that may be due is paid, the husband has no right to force and compel his wife to come to his house.*

Q. 2. Is the wife, under the above circumstances, after her disobedience, entitled to maintenance? and is she, before receiving the dower which was stipulated to be paid promptly, at liberty to depart and leave her husband's house?

And is entitled to maintenance.

R. 2. She is entitled to maintenance under such circumstances, notwithstanding the fact of her having opposed the inclination of her husband, and she may depart and leave her husband's house, unless he pay the dower which was stipulated to be promptly paid.

Q. 3. Under the above circumstances, is the stipulated dower due from the husband, after consummation?

And dower nevertheless due after consummation.

R. 3. It is due, as appears from the authorities above-quoted,—"It (the dower) becomes due on consummation, or complete retirement, or the death of either party;" and this is the doctrine laid down in all the legal authorities.

CASE XXXII.

Q. 1. Is there any fixed period, according to the Moohummudan Law, beyond which a claim of debt

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* The received opinion however is, that if it have been expressly stipulated that the payment of the whole of the dower shall be deferred to a future period, the wife has no right to claim a part before the arrival of such period, inasmuch as her right was voluntarily surrendered by herself.

cannot be preferred? and is a debt of dower considered in the same light as other debts, or are there any peculiarities attending it?

R. 1. There is no fixed period* beyond which payment of dower cannot be claimed, and a claim of dower is considered in the same light as other claims, which cannot be defeated without satisfaction by the debtor or relinquishment by the creditor; as is laid down in the *Kafee*,—"A debt of dower is viewed in the same light as any other debt which has been contracted by a stranger, and the claim of payment cannot be defeated until the debtor liquidate it, or the creditor relinquish his claim." So also in the *Foosool-i Imadeeya*,—"Payment of a wife's dower is incumbent on the husband, in like manner as the payment of his other debts, and, until satisfaction is made, the estate cannot be distributed among his heirs." **No limitation of period to bar a claim of dower.**

Q. 2. If a widow did not demand her dower, which was stipulated to be paid promptly, during the lifetime of her husband, and he did not liquidate any part of it, is the period of limitation (supposing there to be any) to be reckoned from the date of the marriage, or from the date of the husband's death?

R. 2. There is no period of limitation fixed for preferring a claim to dower, or other debts. The attempt therefore is needless to fix a period for the claim of dower to be preferred, even though it was stipulated to be paid promptly; but it became due from the date of the marriage, and if the husband, during his lifetime, did not discharge that part stipulated to be paid promptly, it, as well as the part the payment of which was deferred, should be realized from the estate. **Even though immediate payment was stipulated.**

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* NOTE.—Vide note to Case XXIX.—ED.

Q. 3. If it was agreed that one-third of the dower should be paid promptly, and the remaining two-thirds deferred, and the wife, during the lifetime of her husband, did not demand payment of the prompt dower, and the husband did not liquidate any part of it, although he, after the consummation of the marriage, was living for thirty-four years; under these circumstances, according to the Moohummudan Law, is there any distinction between the prompt and deferred dower?

All claimable on the husband's death.

R. 3. Under the circumstances stated, according to the Moohummudan Law, there is no distinction between the prompt and deferred dower, that is to say, the widow has a lien for both descriptions of dower on her husband's estate.

Q. 4. If the husband, in his lifetime, gave any thing to his wife beyond the necessaries of food and clothing, should such presents be deducted from the debt of dower or not? And is it incumbent on the heirs of the husband to satisfy the widow of the accuracy of their accounts?

Dower how affected by husband's donations.

R. 4. If the husband gave either money or effects to his wife beyond the necessaries of life, in consideration of her dower, such presents should be deducted from the debt of dower, and in this case it is incumbent on the heirs to satisfy the widow of the accuracy of their accounts; but if he gave them *gratis*, it is a voluntary donation, of which no account need be taken, as is laid down in the *Hidaya*,—"If a husband were to send any thing to his wife, and she were to denominate it a present, while he asserts that he has given it in part payment of her dower, in this case the declaration of the husband must be credited."*

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* Vide App. Tit. Dower 18.

Q. 5. Supposing that no claim of dower can be preferred, either by reason of the omission to prefer it within the stipulated period, or by reason of its having been discharged by the husband during his lifetime, is the widow nevertheless competent to obtain her legal share of inheritance together with the other heirs of her husband? If so, what portion will she obtain as her legal share?

R. 5. By the first reason assigned, the claim of dower cannot be defeated, because there is no fixed period of limitation to a claim of dower; nor can the length of time elapsed since the marriage have that effect, insomuch that even were it, for such reason, declared to be forfeited by judicial authority, such decree would be null and void, as is laid down in the *Foosool-i-Imadeeya*,*—"If a *Kazee* annul the claim of dower on any other ground but that of evidence to her having received it, or her own acknowledgment to that effect, relying on the vulgar doctrine, that length of time since a marriage was contracted affords presumption that the dower was either liquidated or relinquished, such order is null and void." So also it is laid down in the *Ashbah-o Nuzayir*. But if the claim of dower be rejected by reason of its having been liquidated during the lifetime of the husband, the widow is nevertheless, after the death of the husband, competent to inherit her legal share together with the other heirs, even should there be children; and if there should be no child, her share is one-fourth, as is laid down in the *Sirajya*,—"Wives take in two cases; a fourth goes to one or more on failure of children, and son's children, how low soever; and an eighth with children or son's children, in any degree of descent."*

Claim of dower cannot be rejected on presumptive evidence.

After satisfaction of dower the widow is entitled to her legal share as one of the heirs.

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* It may be a question, how far the rules of limitation laid down in section 14, regulation 3, 1793, and the subsequent enactment, (2 of 1805), should be held to

CASE XXXIII.

Q. A woman, on the occasion of her marriage, had a certain sum of dower settled upon her. The agreement was duly witnessed, but no deed was executed, nor was the agreement reduced to writing in any shape. Is such a mode of proceeding regular, and can the woman recover at Law the amount stipulated for? Are the mother and brother of such woman competent, after a period of more than twelve years has elapsed since her death, to sue the husband for the recovery of the dower? Subject to what limitation of time is a claim of this nature preferrible, and, after the death of the woman in question, in what proportion should the estate left by her be distributed among her husband, her mother and her brother?

In a case of dower deed not necessary.

R. The proceeding in this case is perfectly regular and proper, and a claim of dower, supported by witnesses, though not reduced to writing, is in all respects valid according to Law. The mother and brother of the deceased woman are competent to prefer a claim against the husband for half the dower agreed upon, even though a period of more than twelve years

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apply to a demand of dower. There can be little doubt, I should suppose, that the rules of a positive enactment supersede the tenets of the Moohummudan Law; but, if the circumstance of the cause of action having originated twelve years before the institution of the claim, be deemed an insuperable bar, there would be very few widows who could obtain their dower, nor would they be likely to save their claim by proving an intermediate acknowledgment on the part of the husband; for, supposing the parties to have lived amicably together, a demand of payment would not only be unusual but disreputable. I find that the provisions of the Scotch Law exactly coincide with this view of the question.—"Prescription does not run *contra non valentem agere* against one who is barred, by some legal incapacity, from pursuing; for in such case, neither negligence nor dereliction can be imputed to him. This rule is, by a favorable interpretation, extended to wives, who, *ex reverentiâ maritali*, forbear to pursue actions competent to them against their husbands, but every prescription runs against wives in favour of third persons."—*Erskine's Principles of the Law of Scotland, page* 369.

Vide Note to Case XXIX.—ED.

may have elapsed.* This circumstance does not invalidate the claim. On the death of the woman her heirs were her husband, her mother and her brother, and the property should (see Prin. Inh. 64) have been made into six parts (the husband's share being one moiety and the mother's one-third), of which the husband was entitled to three, the mother to two, and the brother to the remaining one as residuary.

Widow's heirs may claim her dower at any time.

Of a husband with a mother and brother.

CASE XXXIV.

Q. A person executes a deed in favor of his wife at the time of his marriage, she being at that time only six, or seven, or nine, or, at the most, ten years old. The husband dies in about a year and eight or ten months after the marriage. Under these circumstances, has the wife any right to succeed to the property of the deceased, in virtue of the deed of dower so executed?

R. Under these circumstances, whatever was settled, ascertained, specified and inserted, in the deed of dower, becomes due on the death of the husband, in conformity to such deed, the provisions of which must be upheld, according to the *Hidaya*,—"If a person specify a dower of ten or more *dirms*, and should afterwards consummate his marriage, or be removed by death, his wife, in either case, has a claim to the whole of the dower specified; because, by the decease of the husband, the marriage is rendered complete, and every thing becomes established and confirmed by its completion,

Whatever was specified as dower is claimable on the death of the husband, without reference to the age of the wife.

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* However questionable may be the propriety of applying the limiting regulations (see Note to the preceding case) to the case of the wife herself, who, for obvious and natural reasons, may have omitted, during a period of more than twelve years, to adduce her claim to dower, yet there can hardly be any doubt of the legitimacy of its application to supersede the doctrine of the Moohummudan Law, in such an instance as the present, where a period of more than twelve years elapsed between the death of the widow and the institution of the claim of dower on the part of her heirs.

Vide also App. Tit. Dower 5, and Morley's Note wherein he has failed to draw the distinction, and 21, together with the note wherein the distinction is drawn.—Ed.

and consequently is so with respect to all its effects." If the husband during his lifetime pay the debt due to his wife on account of her dower, it is well, otherwise it must be defrayed from the property left by him. Dower must be satisfied before claims of inheritance, and the heirs have no title to any part of the property, if it does not exceed the amount claimable as dower. The earliest period of puberty, with respect to a girl, is *nine* years.

Earliest age of female puberty.

CASE XXXV.

Q. 1. Is the deed of dower legally valid and binding, or not, and according to Law and the custom of the country, notwithstanding that the married woman may not have been divorced, is the amount a debt due from the grantor of the deed and his heirs, and claimable by the heirs of the wife? or is such deed of dower only given to prevent divorce, and not due on the death of the husband or wife, should no divorce have taken place?*

Stipulated dower, however excessive, is recoverable at Law.

R. 1. The deed of dower granted in favor of a free woman in this case, has been proved to be good by the evidence of the deputy *Kazee* and of witnesses, and the amount due on account of dower, as specified in the deed, is due from the husband on complete consummation without a divorce taking place. It is claimable on the husband's passing a divorce, or on his death; and the payment of it, on demand of the wife or her heirs, is incumbent on him, in like manner as the

* The amount of dower in this case was excessive, and the sum stipulated was far beyond the husband's capacity of paying. As dower becomes payable on divorce, it is a frequent practice in India to stipulate on behalf of the wife for a larger amount than the husband is capable of paying, with a view to prevent the possibility of divorce; and the question in this case was put to ascertain whether such a promise on the part of the husband was to be considered *bonâ fide* and binding, or merely nominal and as a device.

Vide Preliminary Remarks, p. XXV and Case XXXVII.—Ed.

payment of his other debts ; after the death of her husband his heirs must pay the dower out of the deceased's property, if he leave assets.

Q. 2. A husband, (as in this case,) having executed a deed of dower in favor of his wife, made over that deed to her at the time of the marriage, and the wife died before the husband, without having become possessed of any of the property specified in the deed. Under these circumstances, is it lawful, or otherwise, for the heirs of the widow to take possession of the property retained by the husband ; and, supposing those heirs not to have become seized of such property during the lifetime of the husband, do the heirs of the husband succeed to his property, in virtue of their right of inheritance, or the heirs of the wife, in virtue of the deed of dower ?

The assignment of a husband's whole property in lieu of an unspecified portion of dower, is null and void.

R. 2. There are two circumstances specified in the deed of dower in question, the one the amount of dower due from the husband, the other the gift of all the property, real and personal, money and effects, possessed by the husband, in lieu of a portion* of the dower ; but as the second condition is a contract of exchange, and as the value of it, which is a constituent part of the dower, is unascertained, such contract is imperfect, and the wife therefore has no right over the property possessed by her husband.† But she and her heirs have a right to demand from him during his lifetime, and after his death from his heirs, the amount of the debt specified as being due on account of dower. Therefore, after the death of the husband, his heirs will have a right to possess themselves

* The doctrine maintained in this opinion is founded on a well known principle of Moohummudan Law, that in all contracts of exchange the value of the articles opposed to each other should be ascertained and defined.

† Vide note to Case XXVI.—Ed.

of his property,* but the heirs of the wife have a right to receive from them the sum specified, by procuring a public sale to be made of the property left by her husband, and possessed by his heirs; or if the heirs of the husband consent, they may take so much of the property as shall equal in value the amount of the wife's dower.

CASE XXXVI.

Q. A person executes a deed of dower in favor of his wife, purporting to convey to her the proprietary right in certain lands, of which he himself was not then proprietor, but which subsequently came into his possession. Is such deed valid and binding according to Law?

Case of property assigned as dower, not in possession of the husband.

R. Under such circumstances, the deed of dower is utterly nugatory and void, unless the husband, subsequently to his acquiring the right to the lands specified in the deed, put the wife into formal possession of them. In this case the deed will be valid and binding, but not otherwise.†

CASE XXXVII.

Q. Supposing a certain deed of dower to be a valid instrument, does the Law require that the sum therein specified should be paid to the widow of the deceased person who executed it, previously to satisfying claims of inheritance out of the property left by him; and the total value of the property left not exceeding what is sufficient to cover the widow's claim of dower, and she having undertaken to liquidate his just debts, is it allowable for her, under such circumstances, to take his landed estate and effects into her own possession, and of her own authority, in virtue of her claim of dower?

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* Vide App. Tit. Dower 16.

† Vide Case XXXVIII.—Ed.

R. The deed of dower in this case is valid, having been proved by witnesses, for, although the specification of excessive dower is not sanctioned by any express authority, yet it is permitted, and therefore the sum mentioned in the deed is due to the widow from the landed estate of the deceased husband and demandable prior to claims of inheritance. But landed property which may not have been distinctly mentioned in the deed, cannot be taken possession of by the widow, of her own authority, in virtue of her claim of dower, without a judicial order, whether the property left be more or less than sufficient to liquidate her due.* She can only become a proprietor of such property by making a purchase of it with the money of her dower, either in pursuance of a judicial order, or by the consent of the heirs. Property distinctly specified in the dower, she may take, by her own authority, without a judicial decree or the consent of the heirs. But, as the adversary of the widow in this case has accepted the management of the landed estate, for her benefit, agreeing to pay to her the rents and profits thereof, without reservation, and has refused to undertake the payment of a proportional share of debt due by the deceased husband, the whole of which the widow has undertaken to liquidate, this amounts to proof of his having acquiesced in the widow's taking possession of the property.†

No maximum in dower.

Landed property may be taken in satisfaction of dower, with the implied consent of the heirs.

CASE XXXVIII.

Q. A man executes a deed of dower in favor of his wife, settling upon her a specific sum of money. In the same deed he states, that he has given to his wife all the money and effects and all the property, real and personal, of which he was then in possession, or of which he may thereafter become

* Vide App. Tit. Dower 16, 45 and note.

† Vide App. Tit. Dower 7, 8, 9, 10, 11.

possessed, in exchange for her dower, on the condition that whenever she demanded her dower he would pay it, conformably to Law, without excuse or evasion. Under this deed, is the wife entitled to all the property, personal and real, of her husband, or is she only entitled to the specific sum mentioned in the deed ?

Of a deed specifying a certain sum as dower and assigning in lieu thereof all the husband's property, whether in possession or expectancy.

R. The expression used by the husband that he had given to his wife all the money and effects and all the property, real and personal, of which he was then in possession, or of which he might thereafter become possessed, in exchange for her dower, amounts to a declaration of an illegal contract of sale, that is to say, a declaration to sell, in one and the same bargain, the property then possessed by the vender and also property which was then non-existent, or which might thereafter come into his possession, without any specification of its value. The expression above adverted to is not declaratory of a gift for a consideration, which depends on the existence of the things reciprocated. Besides, in cases of sale and gift, it is necessary that the consent should be expressed in the place in which the tender was made ; and if, before the expression of consent, the tender should be retracted, it is thereby rendered null and void. In this case it does not appear that consent was expressed after the declaration. On the contrary, from the concluding part of the sentence, conditioning that, whenever she demanded her dower, he would pay it conformably to law, without excuse or evasion, it is inferrible that the husband did retract his declaration ; because, if consent had been expressed in the place were the declaration was pronounced, before the retractation, it could not be obligatory on the husband to pay the dower on demand. Therefore the property, real and personal, will not pass to the wife under the deed in question, but she

is entitled to the specific sum settled on her as dower.*

CASE XXXIX.

Q. A woman brought an action against her husband to recover one-third of her dower, which was stipulated to be paid promptly; and obtained judgment for the amount claimed. She died during the lifetime of her husband, and after her death her sister sued her husband for the remaining two-thirds due to her on account of dower. According to the Moohummudan Law, will such an action, brought by the sister of the deceased wife, lie against the husband, and is the husband entitled, on the death of his wife, to come in for any part of the sum specified in the deed as due to her on account of dower?

There being no other heirs of a deceased woman, her husband and sister share her dower equally.

R. The action brought by the sister of the deceased wife to recover the total two-thirds of the dower due to the latter is inadmissible, because the sister is an heir, and she can sue for the whole, only in virtue of being a legatee; and it is not allowable to make a legacy in favour of an heir. But the plaintiff being sister of the deceased, is entitled to one moiety of the amount of the dower unpaid, and the remaining moiety will revert to the husband.

CASE XL.

Q. A woman sues her husband for forty thousand rupees and one gold mohur, claiming that sum as a debt due on account of dower. The evidence of the relations of both parties tends to prove that the amount abovementioned

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* The provision contained in the latter part of the deed was invalid, because, in all contracts of exchange certainty is requisite, and it is essential that the subject of the contract should be actually in existence at the time, or susceptible of delivery at some future definite period. See Prin. Sale 13 and 14.
Vide Case XXXVI.

is due, and it is also established, by the evidence of the same description of persons, that it never has been usual to stipulate for less dower on the occasion of the marriage of the female relations of either party. The defendant, however, declares the amount of dower to have been fixed at the lowest legal standard of ten *dirms*, and he has adduced the evidence of strangers to prove his assertion. Under these circumstances, is the allegation of the wife to be preferred, or is the assertion of the husband entitled to superior regard?

In a dispute relative to the amount of dower, the evidence adduced by the wife is preferable to that of the husband, provided her proper dower falls short of the amount claimed, but not otherwise.

R. Under the circumstances above stated, the allegation of the wife is to be preferred, agreeably to the doctrine contained in the *Hidaya*,—"In a case where a dispute arises between the husband and wife concerning the amount of the dower on the continuance of the marriage, let us suppose that the husband declares one thousand *dirms* for instance, and the wife claims two thousand, whoever of the two produces evidence in support of his or her declaration, the same is to be credited; and, if they both produce evidence, the evidence on the part of the wife is to be credited; because, by such evidence her right to the excess is established." So also in the *Tatar Khaneea*,—"Should each party produce evidence, that which proves the most is the more weighty and preferable." In case of a dispute relative to a claim of dower it is incumbent on the judge to award the proper dower; that is a sum proportionable to the rank and circumstances of the wife; as is laid down in the *Aulumgeeree*,—"Where a husband and wife dispute as to the amount of dower, the judge should award proper dower." In a suit relative to matters connected with marriage, a preference should be given to the evidence of relations over that of strangers; as is laid down in the *Hummadee*,—"The

Proper dower should be awarded where there is no evidence to prove the amount.

evidence of the families of the parties is preferable to that of strangers, in a case of marriage."*

CASE XLI.

Q. A person says to his wife "you are not my wife," and she in reply says "you are not my husband." The parties however live together until the death of the husband. Do these words amount to a divorce, and

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* The cause in which the above opinion was given, having been appealed to the Court of *Sudder Dewanee Adawlut*, the Law Officers of that Court were required to state, after a perusal of the proceedings, whether there was sufficient evidence to prove the alleged divorce; and if so, whether the sum claimed was actually due from the husband, and generally whether the exposition of the Law, as given in the Provincial Court of Patna, was correct. To this reference the *Kazee* and *Moofiees* replied that the divorce was fully proved, and that judging from the evidence in favor of the wife only, the sum claimed by her would appear to be due from the husband. With respect to the general accuracy of the *Futwa* delivered in the Court below, they observed that the opinion therein contained, that the evidence of the wife should be preferred in cases where each party adduces evidence though entertained by some lawyers, is nevertheless not the accurate or prevailing opinion, and that it is not sanctioned by the commentator on the *Viqaya*, or by the compiler of the *Hidaya*. As to the passage cited from the *Hummadee*, they declared their inability to find it in that work. It may seem strange that the *Futwa* delivered in the Provincial Court was signed by no less than five *Moofiees* and that they should have misquoted the *Hidaya* in so extraordinary a manner. The Law is not that the evidence of the wife is to be preferred to that of the husband in all cases; but only in case her proper dower (that is the amount usually paid as dower to females of the same family) falls short of the amount claimed by her. The following is a correct extract from the *Hidaya*. The part in Italics was omitted in the quotation of the *Moofiees*,—"In a case where a dispute arises between the husband and wife concerning the amount of the dower on the continuance of the marriage, let us suppose that the husband declares one thousand *dirms* for instance, and the wife claims two thousand; *in which case, if the proper dower of the woman do not exceed one thousand, the declaration of the husband is to be credited; but if it be two thousand or upwards, that of the wife*; *and* whoever of the two produces evidence in support of his or her declaration, the same is to be credited, *under either of the above circumstances*; and if they both produce evidence, *under the first of the above circumstances, that is the woman's proper dower not exceeding one thousand dirms*, the evidence on the part of the wife is to be credited, because by such evidence her right to the excess is established."

The principle on which the Law proceeds is as follows.—If the proper dower of a woman equal or exceed the amount of her claim, and neither party have evidence, her allegation is to be credited, because, *primâ facie*, it is more probable; but if, under such circumstances, both parties have evidence, that adduced by the husband should be preferred, because the object of evidence is to establish some matter which is not *primâ facie* apparent.

are they sufficient to exclude the wife from the inheritance or not?

Of divorce.

R. Under the above circumstances, the widow can not be debarred from inheriting her husband's estate, because such a declaration does not amount to divorce, so as to exclude from inheritance. It is laid down in the *Futawa-i-Aulumgeeree* and other books of Law,—"If a man say to his wife 'you are not my wife,' by such declaration no divorce will take place, even although such was the intention of the husband, and this opinion is universally received."

CASE XLII.

Q. A person on the 20th of *Suffur* in the year 1232, *Hijree* (corresponding with the 7th *Pous* of 1224, B. S.) declared that he had repudiated his wife by three divorces, agreeably to the rules of the Moohummudan Law, from the year 1178 or upwards of forty-six years back. In this case, from what date should the divorce be held to take effect?

A divorce cannot be referred back to an antecedent period.

R. Under the above circumstances, if the wife deny the fact of her having been divorced by the husband, the divorce according to Law, should be held to take effect from the date on which it was declared; as is laid down in the *Shurhi Viqaya*,—"If a person say to his wife, whom he married previously to the day to which he referred the divorce 'you are divorced yesterday,' and she deny it, the divorce takes effect only from the moment of its being declared."

CASE XLIII.

Q. A man of credit and respectability had two wives, by each of whom he had children. On his death the friends of the children of one of his wives declare that

the other was not married to him, but merely entertained by him as a servant. Owing to the length of time which has intervened, the fact of the marriage cannot be fully substantiated. Under these circumstances, what should be considered sufficient proof to establish the marriage?

The parentage of the offspring of a free woman having been acknowledged, is sufficient evidence of her marriage with the acknowledger.

R. If the person representing herself as the wife of the deceased, (whose marriage with him, owing to lapse of time, cannot be proved, and who is declared by the opposite party not to have been married to him, but merely entertained as a servant) is a free woman, and not a slave, and the deceased should have acknowledged the parentage of her offspring, such acknowledgment on his part is sufficient evidence of the marriage, but it is not sufficient evidence on which to establish a claim of dower, as is stated in the *Ashbah-o-nuzayir*,—"An acknowledgment of parentage is an acknowledgment of marriage, but not of dower."* In this case, though there is no evidence to the nuptials, there is the acknowledgment of the father as to the parentage of the child, which is sufficient proof of marriage.†

CASE XLIV.

Q. A woman having been divorced by her husband, lodges a complaint against him, claiming the sum of six rupees and twelve annas as her alimony for the time of *Edit* or term of probation, being three months and thirteen days. After the divorce, according to the Moohummudan Law, has she any right to obtain maintenance from her husband for the time of *Edit* or term of probation? and how many months and days are fixed as the period of *Edit* or term of probation?

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* Vide Case XIII, where, in an analogous case, a widow was declared entitled to dower.—Ed.

† This is going beyond the maxim that "*Pater est quem nuptiæ demonstrant;*" for in this case the nuptials are indicated by the father, and not the father by the nuptials.

Term of probation after divorce.

R. According to Law, the *Edit* or term of probation of a woman arrived at the age of puberty, and divorced from her husband, extends until three successive menstruations have occurred. It is laid down in the *Viqaya*,—"The time of *Edit* or term of probation allowed to a free woman is that occupied in three successive menstruations." "The *Edit* of a woman, who, on account of extreme youth or age, is not subject to the menstrual discharge is three months." "The *Edit* of a pregnant woman is accomplished by her delivery." So also the same authority,—"The *Edit* of a pregnant continues until she be delivered of a child either dead or living." It is incumbent on the husband to defray the expenses of his divorced wife on account of food, raiment and habitation until the time of *Edit* or term of probation be expired. As is declared in the *Shurhi Viqaya*,—"To a woman reversibly and to one irreversibly divorced, and to one whose separation from her husband originated from no circumstance which can be imputed to her as a crime, as in a case of option of puberty or manumission, or of a separation demanded by her on account of inequality, maintenance and a habitation should be assigned."

Alimony claimable during the term.

CASE XLV.

Q. To which of the parents does a bastard child belong, and to which of them should the charge of it be confided, when they each separately claim it?

A bastard child is *filius nullius*, but the mother has a right to it until seven years old.

R. A bastard child belongs, legally speaking, to neither of its parents, and it is in every sense of the word *filius nullius*; but for the purpose of securing its due nourishment and support, it should, until it has attained the age of seven years, be left in charge of the mother. After that age it may make its own election with which

of the parents it will reside, or it may live apart from them altogether, if so inclined.*

CASE XLVI.

Q. A woman lived, for a considerable time, in a state of cohabitation with a man, but it is not clearly proved, that she was married to him. Afterwards disagreeing, they separated. The parties are now disputing about the right to several daughters, who were the fruits of their intercourse. To which of them does the possession of the daughters belong according to Law?

R. If the man declare, that the daughters are his offspring, such declaration must be upheld as conclusive, provided that the woman has apparently no other husband; because the fact of parentage may be determined by declaration. The maintenance of the daughters is incumbent on the father, but not on the mother. Those daughters are free, and cannot therefore be considered in the light of slaves. It follows, as a consequence, that marriage must be presumed, to guard against the supposition of fornication. If the man however confess, that the daughters are the fruits of fornication, there will be no legal relation between him and them, nor will their maintenance be incumbent on him.†

Legitimacy how presumable.

CASE XLVII.

Q. Supposing A not to have acknowledged, during his lifetime, the parentage of B and C, begotten on his

* This corresponds exactly with the provisions of the English Law on the same subject, according to which a bastard until it attain the age of seven years cannot be separated from its mother. The Moohummudan Law, however, in this particular does not apply this rule exclusively to bastards, but generally to all children, whether legitimate or illegitimate.

† The extreme tenderness of the Law with regard to children is such, that it will never suppose them to be illegitimate, so long as it is *possible* to suppose that their parents were lawfully married.

slave girl, and not to have performed the ceremony of *numukchushee,** have B and C a legal right to inherit the property left by the deceased A, notwithstanding the omission?

Parentage of children, under what circumstances established without acknowledgement.

R. Although it does not appear that A made any direct acknowledgment of parentage, yet B and C have a legal right to inherit the property left by him, because it has been established by witnesses, that they are the sons of a woman (called a slave) who was living in a state of cohabitation with A. From these and other circumstances of the case, such as outward appearances and notoriety, it is established, that B and C were the sons of A, and that their mother was married to him. The witnesses, who negatived the marriage, obviously intended to assert, that they had no ocular knowledge of the fact, not on absolute denial of its having occurred, to assert which, would be a palpable and malicious falsehood. Besides it is not allowable to impute fornication to a Moosulmaun. The absence of ocular knowledge is not detrimental, in the case of evidence founded on notoriety. Had the witnesses possessed ocular knowledge, they would not have deposed to the notoriety of the fact. In the evidence there is no direct proof that the deceased did not acknowledge the parentage, and admitting that there was evidence to that effect, it would not be prejudicial, because the popular meaning of the term "*slave,*" as used in India, is a nominal slave, that is to say, a person really free, who is hired or purchased, and is therefore designated a male or female slave; and to establish the parentage of the offspring of such slave girl, claim and acknowledgment are not ne-

* This is an usual ceremony performed by Moohummudans, consisting, as the name imports, in causing the children to taste salt. It seems to be a superstitious practice, and is apparently borrowed from the *annaprasuna* of the Hindoos.

NOTE.—Numukchusee is not described, at least, under that name, in the Qanoon-e-Islam or customs of the Moosulmauns; but the reader will find in that work, a detailed account of the ceremonies attendant on childhood, a knowledge of which may be useful to a Judge or Practitioner, when engaged in a case of disputed paternity.—ED.

cessary. It is admitted, that to establish the parentage of the offspring of legal slave girls, claim and acknowledgment are necessary, but, in legal strictness, slavery has been almost extinct in this country, for a series of generations. The expression "unmarried," (used by some of the witnesses) affords presumption, that the woman was the nominal slave of the deceased, because legal slave girls cannot be married by their masters. The ceremony of *numukchushee* is not legally insisted on, so as that by its omission, the parentage would be set aside. The authority for the above opinion is an extract from the *Kholasut-ool Mooftieen,*—"Generally speaking, hearsay evidence is not admissible, except in four cases. Regarding death, or descent, or marriage, or with respect to a *Kazee.* To instance this in a case of descent, when a person hears from others, that such a one is the son of such a one, it is competent to him to give his evidence to that effect, although he may not have witnessed the birth in that person's family; in the same manner as we at this day testify, that *Aboo Bucr* (on whom be the mercy of God) was the son of *Quhafa,* although we never saw *Quhafa.* To instance marriage, when a man sees another living in a state of cohabitation with a woman, and it is rumoured that she is his wife, it is competent to him to give evidence, that the woman is the wife of that person, although he may not have been present when the marriage was contracted. And when persons give evidence, under such circumstances, declaring that they are not eye witnesses to the fact, but that it is notorious, their testimony will be received as valid." Such also is the doctrine contained in the *Hidaya,*—"It is not allowable for witnesses to depose to any thing, which they have not seen, except in cases of descent, marriage, death, jurisdiction of a *Kazee,* and sexual intercourse. It is competent to a person to depose to a fact, which may have been com-

Authorities for the admissibility of hearsay evidence in cases of marriage and other instances.

municated to him by another, in whom he has confidence. This proceeds upon a favorable construction. Thus for instance, a person sees a man and woman living in the same house, and cohabiting with each other after the manner of husband and wife. In such case he may depose to the marriage." The same doctrine is maintained in the *Moheet-oo Surukhsee*, *Munnih-ool Ghuffar*, *Buhroorayiq* and other standard authorities.*

CASE XLVIII.

Q. A person disinherited his son, and afterwards being on his death-bed, repudiated his wife, the mother

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* The above opinion was delivered by the *Kuzee-ool Koozat*; but the first *Mooftee*, *Moohummud Rashid*, disagreed with him in opinion, maintaining, that the parentage was not established, and that B and C had no right of inheritance to the property left by A. His argument was, that there are two descriptions of slaves, the one nominal and the other legal, and that supposing the mother of B and C to have been of the former description, that is to say, a nominal slave or really free, in order to establish the parentage, it was necessary to prove a marriage. If on the other hand, they were legal slaves, the acknowledgment of parentage by A was necessary to prove their descent. On further reference to other Moosulmaun doctors, the opinions were nearly equally divided; but after all, the difference of opinion merely originated in a different estimate of the evidence, and not on a point of Law. There can be no doubt of the accuracy of *Moohummud Rashid's* opinion, supposing the evidence not to amount to proof of marriage; but it is equally certain, that the other was the correct opinion, supposing the evidence to have afforded such proof. Cohabitation and notoriety afford sufficient presumption, and hearsay evidence is admissible in such cases. Vide the Chapter on Evidence, Hamilton's Translation of the *Hidaya*, vol. 1, page 677. The Court therefore decided in favor of the sons, the nature of the evidence being deemed sufficient to establish their descent. But three points of Law were settled in this case. First,—That a marriage may be proved by something short of ocular proof, such as continual cohabitation, notoriety, hearsay or circumstantial evidence. Secondly,—That where a woman is really and legally the slave of a man (that is to say, has been captured in an infidel country, or is a descendant of such captive), her master cannot marry her; and to establish his parentage to the children begotten on such woman, he must claim and acknowledge them. Thirdly,—That where a woman is merely the nominal slave of a man (that is to say, has been sold, or hired to the person with whom she resides, which condition is not recognized by law as slavery), her master can marry her; and where there is circumstantial evidence to presume matrimony, the offspring will be legitimate, without claim or acknowledgment on the part of the father.

of the son, by divorce. Are the disinheriting and divorce in such case legal, and has the divorced widow any right to inherit the estate of the deceased?

R. If a person deny the parentage of a child at the time of its birth, and when he receives the congratulations usual on the occasion, such denial, according to the Moohummudan Law, is available, and if he disown him after the time already specified, his disowning is of no effect in Law; as is laid down in the *Viqaya*, "If a man deny the parentage of a son at the time of his birth, or at the ceremony usual at the nativity, his denial is effectual, otherwise not; and in such cases the husband and wife should both be subjected to *laân* or imprecation."* If a man divorce his wife, being in health at the time, divorce is legal and valid, and the divorced wife has no right to inherit the property of her husband; but if the husband, being on his death-bed, repudiate his wife by an irreversible divorce, and he die before the expiration of the period of her *edit* or term of probation,† the divorce is good, but she has a right to inherit: if on the other hand, he survive her term of probation, she is excluded from the inheritance. It is declared in the *Futawa Nukshbundee*,—"If a person, being on his death-bed, repudiate his wife by an irrversible divorce, and he die before the expiration of the term of probation, she will inherit from him, but if he die after the conclusion of the term, she will be excluded from the heritage."

Denial of parentage when available.

Of death-bed divorce.

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* *Laân*, in the language of the Law, signifies testimony confirmed by oath. on the part of the husband and wife (where the testimony is strengthened by an imprecation of the curse of God on the part of the husband, and of the wrath of God on the part of the wife), in case of the former accusing the latter of adultery. See *Hidaya*, vol. I, page 344.

† The time of probation which a divorced woman is to wait before she can engage in a second marriage, in order to determine whether or not she be pregnant by the former. See *Hidaya*, vol. I, page 83.

CHAPTER VII.

PRECEDENTS OF GUARDIANS AND MINORITY.

CASE I.

Q. A person transfers by gift the whole of his property to his wife and minor children. On the death of the wife, her brother lays claim to the charge of the persons and property of the minors, in virtue of a nomination to that effect in the will of the original proprietor, and likewise by the appointment of his sister. The brother of the original proprietor also puts in the same claim, in virtue of his being next of kin. In this case, to which of the two persons above specified does the right of guardianship legally attach?

Guardians for the marriage of minors.

R. In Law, guardianship over minors is of two descriptions: the one is for the purpose of matrimony, the other for the care of the property. The right of guardianship, for the purpose of matrimony, attaches to the paternal kindred; according to the *Viqaya*,—"The paternal relation is the guardian, according to his proximity in point of inheritance."

And for their property.

The care of the property legally devolves, first on the father and his executor, next on the paternal grandfather and his executor, next the right of nomination rests in the ruling power and its administrator: that is to say, any person whom the government may please to appoint to the custody of the infant's property is a legal guardian; according to the authority above quoted,—"First, his father, or the executor of the father, is his guardian, then the paternal grand-father or his executor, then the magistrate or his executor." The mother, and the paternal uncle, and the maternal uncle, have no legal title to the guardianship of the property of the minors, as

they do not come within the class of persons above enumerated. The alleged appointment by the mother is nugatory, because, having no right of guardianship herself, she cannot convey such right to another. If the alleged appointment of the maternal uncle, in the will of the original proprietor, be proved by competent witnesses, he will be legally entitled to the guardianship of the minors. If not proved, it will remain with the ruling power to nominate a guardian.*

CASE II.

Q. A and B are joint proprietors of certain property with C, a minor, the latter having an equal interest with his uncle A, who was duly appointed his guardian. These two persons, that is to say, A the uncle, and, through him B his wife, act the part of guardians and manage all the pecuniary concerns of the minor. By some means they contrived to sell a portion of the minor's property to a third person, and still persist in maintaining the validity of the sale, on the plea of their having the entire management of the person and property of the minor. Under these circumstances, is such sale valid and maintainable by the venders, in virtue of the deed of sale having been regularly signed, sealed and duly attested by others ?

R. If the joint property of A, B and C was real, that is to say, consisted of lands, the sale by A and B of C's portion is illegal, notwithstanding the fact of their having the care of his person and property, unless under certain circumstances ; unless the minor's share can be sold for double its value, unless there are no means of supporting him without having recourse to a sale of his property, unless the lands be in im- Sale of minor's landed property.

* See Prin. Guard. 5, 6, 7 and 10.

minent danger of being lost, or unless with a view to save the minor's property from usurpation, or unless some similar emergency exist. If A and B, under such circumstances, sold the minor's share in the lands, the sale will be valid and binding. If, on the other hand, the joint property was not real, but personal, A and B have no right to dispose of the minor's share, if he thereby sustain any loss, or if it be an equal chance whether profit or loss will accrue. But if by the transaction it be manifest that C must gain clear profit, it is allowable for A and B to sell his share. The principle of the Law is, that it is allowable for a guardian, executor, or any one who has the care of the person and property of a minor, to enter into a contract on his behalf where the profit must be clear and certain; for instance, they may always accept a gift on his behalf. In the case of a contract where there is a possibility of loss, it has been held that a near guardian (by which is meant a father or grand-father or guardians duly appointed by them) is at liberty to enter into it, but that a remote guardian, such as an uncle or a brother, is not at liberty to enter into such contract on behalf of the minor. Where, however, nothing but loss can accrue to the minor, such as in case of making a donation or granting a loan, it is not legal for any guardian, near or remote, or for any executor or other person under whose care he is, to act on his behalf.*

And of his personal property.

Powers of guardians in general.

CASE III.

Q. A person dies, leaving a son aged three years, a daughter at the breast, a widow (the mother of the children) and a half-brother. Under these circumstances, who is legally entitled to the care of the persons of the minors, and, after the widow's claim of dower

* See Prin. Guard., &c. 14 and 15.

Vide Case VI. Prec. of Slavery.—Ed.

has been satisfied, who has the right of exercising the functions of trustee and manager of their property?

R. The mother is entitled to the care of her infant children if she continue single, but she forfeits this right immediately on her contracting a second marriage. If, however, within the period of the infancy of the children, a separation should take place between her and her second husband by divorce or other means, the right reverts to her, because the objection to her having the charge of the infants is thereby removed. But by the marriage of the mother with a near relation of the infants, such as their paternal uncle, her right to retain charge of them is not forfeited. This being the Law, therefore, if the mother of the infants should not have contracted a marriage with sume stranger, she is entitled to the care of the son, until he attain the age of seven years; this being the age fixed upon at which a boy is so far independent as to be able to perform, without assistance, those acts which are absolutely necessary. When he shall have become so far independent, that is to say, when he shall have attained the above age, he must be delivered (even though force should be used in separating him from the mother) to his natural or appointed guardian, because to them belongs the duty of education. The daughter should be left under charge of the mother until she manifest natural signs of puberty.*

Mother's right of guardianship, lapses by her second marriage.

Except with a near relation.

Her right over sons when ceases.

And over daughters.

CASE IV.

Q. Is a person legally competent to commit the guardianship of his infant daughter to his wife, who is the mother of the infant?

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* See Prin. Guard, &c. 8 and 9.

NOTE TO CASE III.—It will be observed that the reply does not meet all the points involved in the question. Vide 5 and 6 of Prin. Guard.

The mother of an infant may be appointed its guardian.

R. A person is legally competent to commit the guardianship of his infant daughter to the mother of such infant, she being his wife. This doctrine is upheld by various authorities, especially by the *Hidaya*, in the chapter treating of gifts.*

CASE V.

Q. 1. A lease being in every other respect conformable to the provisions of the Moohummudan Law, must it be set aside merely on the ground of its being granted in perpetuity or of the death of the lessor, and of his successor who confirmed the grant?

The non-specification of a term or the death of either of the contracting parties is sufficient to set aside a lease.

R. 1. Although the lease may have been in every other respect conformable to the provisions of the Moohummudan Law, yet the fact of its having been granted in perpetuity and the death of the lessor are each, separately, sufficient to set it aside; because, in all leases, the specification of a term is an essential condition of the contract and the existence of both of the contracting parties, until the expiration of the term it is indispensable to its continuance.

Q. 2. Supposing that the lease was for a limited period, that it was otherwise valid, that the successor of the original lessor confirmed the lease in a formal manner and made mention of it in a deed of gift which he executed in favour of his six sons and the parties in this cause, that the lessee (being the minor son of the lessor) was registered as farmer during the lifetime of the lessor, that the lessor during his lifetime ma-

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* Had there been no appointment, the mother would have been entitled to the custody only of her child until its attaining a certain age. (See Prin. Guard. and Min. 8.) The doctrine laid down in this case merely tends to establish the fact that the mother is equally eligible with others to be nominated guardian.

naged the farm for his minor son, and that, after his death, and during the minority of the lessee, his cousin acted as manager on behalf of the minor, who, on his coming of age, took possession of the farm himself, conforming to all the conditions of the contract ; under these circumstances, is the lease good and valid ?

Though the lessee be a minor a lease is good.

R. 2. Supposing the contract to be in all other respects good and valid, as stated in the foregoing question, it should be upheld under the circumstances therein set forth, the successor of the lessor having confirmed the contract, and the farm having been managed by the minor's guardian, notwithstanding the fact of the minority of the lessee.

Q. 3. The gift in favour of a minor is perfected by the seizin of his father or other guardian. Is the seizin of a guardian of a minor farmer on the same principle sufficient to establish the validity of the lease ? and is the consent of the minor to the conditions of the contract, after his coming of age, sufficient to uphold it as valid and binding ?

Unless it involve some prejudicial conditions.

R. 3. As the seizin of a father or of a guardian is sufficient to perfect a gift in favour of a minor, so a similar seizin is sufficient in the case of a lease, unless there may be some conditions in the contract prejudicial to the interests of the minor, such as a stipulation for the payment of the rents, notwithstanding any injury sustained by the estate, in consequence of inundation, drought or destruction of the produce by other unavoidable accidents, in which case the minor is at liberty to object to the fulfilment of such conditions made during his minority ; for a contract which was essentially void cannot subsequently be insisted on as good and valid.

CASE VI.

Q. A person at the point of death nominated his wife and the brother of his son-in-law to the charge of the persons and property of his infant son and daughter, the former of whom was six years old, and the latter only two years old. The minor son institutes a suit against a stranger to recover some personal property. Under these circumstances, is the action instituted by the minor son maintainable in Law or not?

R. It appears from the petition presented by the wife and the brother of the son-in-law of the deceased, that he (the deceased) committed to them the care of his infant children, and made over to them his entire property in trust for the support of those children. They are therefore, according to the Moohummudan Law, executors of the deceased to all intents and purposes; as is laid down in the *Shurhi Viqaya*,—"He to whom the father has entrusted the disposal of his family and fortune is his executor." An executor duly constituted must be considered the guardian of the son; as appears from a passage in the *Viqaya*,—"The guardianship of a minor legally belongs, first to the father, next to his executor, next to the paternal grandfather." A suit instituted by two executors conjointly or by either of them separately, for the right of an orphan, is maintainable in Law; according to the authority already quoted,—"If a man appoint two persons as his executors, they are not entitled to act separately, except for the performance of the deceased's funeral ceremony or for the preferment of a claim to maintain his right."* In the present case the action is good, because both the executors concurred and supported the claim set up by the minor son.

An action may be instituted by a minor, with the approbation of one of his guardians.

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* Note.—Vide Elberling on Inheritance, p. 30, wherefrom it appears that the privilege extends only to verbal pleading, and that written proceedings must be conducted conjointly.—Ed.

Vide App. Tit. Guard. 1.

CHAPTER VIII.

PRECEDENTS OF SLAVERY.

CASE I.

Q. A Moosulmaun having been sent by the ruling power to subdue some rebellious Hindoos, and having obtained a victory over them, took several of their body prisoners. Among them, there was one boy of tender years, whom he made his own slave, and afterwards, having instructed him in the principles of the Moohummudan faith, he adopted him as his own son, and, in his education and other matters, he treated him with the care and consideration of a parent. Under these circumstances, can the boy so recognized as the son of the person above alluded to, be considered as his slave agreeably to Law?

Emancipation of a slave by what means implied.

R. Admitting that the boy was legally reduced to slavery (which by no means appears clearly from the question), if the Moosulmaun recognized him as his son, and declared him to be such, he will be free, even though that may not have been the intention of the person who made the declaration. If a person should say "this is my son," or "this is my daughter," emnacipation follows of course, without proof of intention. The reason is, that, as the expression, in its strict sense, is not applicable, it must be taken, in its metaphorical sense, to mean emancipation; whatever may have been the intention of the person who used it. Consequently, if the Moosulmaun, in this case, not only called the boy his son, but also treated him with parental care and consideration, he must *a fortiori* be accounted free, and after his emancipation has been once established, he cannot, under any circumstances, revert to the

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NOTE.—For information on the subject of a species of slavery still prevailing in parts of India, the reader is referred to Mr. Magte. Toogood's letter to the Session Judge of Bhaugulpoor, dated Monghyr, 26th July 1858, published at page 433, Vol. V. of Sevestre's Sudr Dew. and Niz. Adawlut Reports, wherefrom it appears, that the sale of children, male and female, for the purpose of being converted into Eunuchs and Prostitutes, prevails in Bengal, and probably elsewhere, to an inconceivable extent. Vide also Chever's Medical Jurisprudence for Bengal and the North Western Provinces, pp. 7, 485—ED.

condition of slavery. Property over mankind is terminable by emancipation, which annuls proprietary right, for, in the original creation of man, he was not intended as a fit subject of property.

CASE II.

Q. 1. What description of slaves are authorized by the Moohummudan Law?

R. 1. All men are by nature free and independent, and no man can be a subject of property, except an infidel, inhabiting a country not under the power and controul of the faithful. This right of possession, which the *mooslims* have over *Hurbees*, (i. e. infidels, fighting against the faith) is acquired by *Isteela*, which means the entire subduement of any subject of property by force of arms. The original right of property therefore, which one man may possess over another, is to be acquired solely by *Isteela* (as defined above); and cannot be obtained in the first instance, by purchase, donation or heritage. When therefore an *Imam* subdues, by force of arms, any one of the cities inhabited by infidels, such of them as may be taken prisoners become his rightful property; and he has the power of putting them to death, or making them slaves, and distributing them as such among the *Ghazees*, (i. e. victorious soldiers, particularly when fighting against infidels); or he may set them at liberty in a Moosulmaun country, and levy the capitation tax. Should he make them slaves, they become legal subjects of property, and are transferable by sale, gift or inheritance; but if, after captivity, they should become converts to the faith (*Islam*), the power of death over them is thereby barred, though they would continue slaves; for slavery being the necessary consequence of original infidelity, the subsequent conversion to *Islam* does not

affect the prior state of bondage, to which the individual has been regularly rendered liable by *Isteela,* provided this be clearly established. From this it is evident that the same rules are applicable to slaves of both sexes. If slaves are afterwards sold or given away, by the *Imam* or by the *Ghazees* who shared at the distribution; or if they should become the property of another by inheritance; they then become slaves, under the three different classes of purchase, donation, and inheritance. If a female slave should bear offspring, by any other than by her legal lord and master, whether the father be a freeman or slave, and whether the slave of the said master or of any other person, in any of these cases, such offspring is subject to slavery; and these are called *Khanazad,* i. e. born in the family. But if the children be the avowed and acknowledged offspring of the rightful owner, they are then free, and the mother of them, (being the parent of a child by her master) becomes at his decease free also. And this rule is applicable to all their descendants to the latest posterity. The practice among freemen and women, of selling their own offspring during times of famine, is extremely improper and unjustifiable; being in direct opposition to the principles above stated; viz., that no man can be a subject of property, except an infidel taken in the act of hostilities against the faith. In no case then can a person legally free become a subject of property; and children not being the property of their parents, all sales or purchases of them, as of any other article of illegal property, are consequently invalid. It is also improper* for any freeman to sell his own person, either in times of famine, or though he be oppressed by a debt which he is unable to discharge. For in the first of these cases a famished man may feed upon a dead body; or may even steal what is necessary for his support, and a dis-

Enumeration of the different modes by which slavery is created.

* Vide Case IV, wherein it is laid down that it is "lawful" for a freeman to sell his own liberty in case of extreme distress.—Ed.

tressed debtor is not liable to any fine or punishment. We are not acquainted with the principal or detailed circumstances, which led to the custom prevailing in most *Moosulmaun* countries, of purchasing and selling the inhabitants of *Ethiopia*, *Nubia*, and other negroes; but the ostensible causes are, either that the negroes sell their own offspring; or that *Moosulmaun* or other tribes of people take them prisoners by fraud and deceit; or seize them by stealth from the sea shores. In such cases, however, they are not legally slaves; and the sale and purchase of them are consequently invalid. But if a *Moosulmaun* army, by orders of an *Imam*, should invade their country, and make them prisoners of war, by force of arms, they are then legal slaves; provided, that such negroes are inhabitants of a country under the controul and government of infidels; and in which a *Moosulmaun* is not entitled to receive the full benefit and protection of his own laws. With regard to the custom prevailing in this country, of hiring children from their parents, for a very considerable period, such as for seventy or eighty years, and under this pretext making them slaves, as well as their progeny also, under the denomination of *Khanazad* (domestic slaves), the following laws are applicable: It is lawful and proper for parents to hire out their children to service; but this contract of hire becomes null and void, when the child arrives at years of discretion, as the right of paternity then ceases. A freeman, who has reached the years of discretion, may however enter into a contract to serve another, but not for any great length of time, such as for seventy years; as this also is a mere pretext, and has the same object of slavery in view; whereas the said freeman has the option of dissolving any contract of hire under either of the following circumstances:—First, It is the custom, in contracts of this nature, for a person hired on service to receive a compensation in money, clothes and food,

as the wages of hire ; any day therefore that a servant receives such compensation, he is in duty bound to serve for that day ; but not otherwise. Secondly, The condition of a contract of hire requires that the return of profit be agreeable to the wages of hire, and this cannot be ascertained, but by degrees and in course of time. The contract of hire therefore becomes complete or fulfilled, according to the services or benefit, actually rendered in return for the wages of hire received ; and the person hired has consequently the option of dissolving the contract at any moment of the period originally agreed for. It is however unavoidable, and actually necessary, in contracts of a different nature, such as in farms of land, &c. that the lessee should not have this power. But reverting to contracts of hire for service, for a long period, and the nefarious practices of subjecting freemen to a state of bondage and slavery under this pretence, it appears expedient to provide against such abuses ; and with this view, to restrict the period of service, in all contracts of hire of freemen, to a month, one year or at the utmost to three years ; as in the case of a farm of endowments. It is customary also, among women who keep sets of dancing girls, to purchase female children from their parents ; or by engagements directly with the children themselves. Exclusively of the illegality of such purchases, there is a further evil, resulting from this practice, which is, that the children are taught dancing and singing for others, and are also made prostitutes ; both of which are extremely improper, and expressly forbidden by the Law.*

Q. 2. What legal powers are the owners of slaves allowed to exercise upon the persons of their slaves ; and particularly of their female slaves ?

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* Vide Case No. VI., and Chever's Med. Jurisp. p. 7, and note p. 311.—Ed.

Duties on which slaves may be employed.

R. 2. The rightful proprietor of male and female slaves has a claim to the services of such slaves, to the extent of their power and ability; he may employ them in baking and cooking, in making, dying and washing clothes; as agents in mercantile transactions; in attending cattle, in tillage, or cultivation; as carpenters, ironmongers and goldsmiths; in transcribing; as weavers, and in manufacturing woollen-cloths; as shoemakers, boat-men, twisters of silk, or water-drawers; in shaving, in performing surgical operations, such as cupping; and as farmers, bricklayers, and the like: and he may hire them out on service in any of the above capacities. He may also employ them himself, or for the use of his family, in other duties of a domestic nature; such as in fetching water for washing, or purification; in anointing his body with oil, and rubbing his feet, in attending his person while dressing; and in guarding the door of his house, &c. He may also have connexion with his legal female slave; provided she is arrived at the age of maturity, and the master or proprietor has not previously given her in marriage to another.

Q. 3. What offences upon the persons of slaves, and particularly of female slaves, committed by their owners, or by others, are legally punishable, and in what manner?

R. 3. If a master oppress his slave, by employing him in any duty beyond his power and ability; such as insisting upon his carrying a load which he is incapable of bearing, or climbing a tree which he cannot accomplish, the ruling power may chastise him. It is also improper for a master to order his slave to do that which is forbidden by the Law; such as to put an innocent person to death; to set fire to a house; to

tear the clothes of another, or to commit adultery and fornication, to steal, or drink spirits, or to slander and abuse the chaste and virtuous; and if a master be guilty of such like oppressions, the ruling power may inflict on him exemplary punishment by *Tazeer* and *Akoobut*, on principles of public justice. It is further unlawful for a master to punish his male or female slaves for disrespectful conduct, and such like offences, further than by moderate correction, as the power of passing sentences of *Tazeer* and *Qisas* is solely vested in the ruling power. If therefore the master should exceed the limits of his power of chastisement above stated, he is liable to *Tazeer*. If a master should have connexion with his female slave before she has arrived at the years of maturity, and if the female slave should in consequence be seriously injured, or should die, the ruling power may punish him by *Tazeer* and *Akoobut*, on principles of public justice as before stated.

A master may be punished for maltreatment of his slave, but this is not legally a sufficient cause for emancipation.

Q. 4. Are slaves entitled to emancipation upon any and what maltreatment? and may a Court of Justice adjudge their emancipation upon proof of such maltreatment? In particular, may such judgment be passed upon proof that a female slave has, during her minority, been prostituted by her master or mistress? or that any attempt of violence has been made upon her person by her owner?

R. 4. If the master of male or female slaves should oppress or tyrannize over them, by beating them unjustly, stinting them in food, or imposing upon them duties of a difficult and oppressive nature, so as to cause them affliction and distress; or if a master should have connexion with his slave girl, before she has arrived at the years of maturity; or should give her in marriage to another, with permission to

cohabit with her, in this state; such master sins against the Divine Laws; and the ruling power may punish him by *Tadeeb* and *Tazeer** on principles of public justice; but the commission of such crimes, by the master, does not authorize the manumission of the slaves; nor has the ruling power any right, or authority, to grant them emancipation. Adverting, however, to the principle upon which the legality of slavery is originally established, (*viz.* that the subject of property must be an infidel, and taken in the act of hostility against the faith); and also to the several branches of legal slavery, arising from this principle, as by purchase, donation, inheritance, and *Khana Zadee*; whenever a case of the unlawful possession of a male or female, shall be referred to the ruling power for investigation, it is the duty of such authority to pass an order, recording the original right of freedom of such individual; to deprive the unjust proprietor of possession, and to grant immediate emancipation to the slave.

CASE III.

Q. 1. The father of Deendar Khan (the plaintiff) was a *Hindoo*, who in a year of scarcity, out of necessity, sold his son to Budun Khan and Mussummaut Asalut, to whose property Gholam Hoosein Khan (the defendant) lays claim. Does Deendar Khan by such sale legally become a slave or not?

A free-man cannot legally be sold as a slave.

R. 1. As the original state of man is freedom, no free person, whether *Hindoo* or *Moosulmaun*, can legally become a slave, from the circumstance of his having been sold in a year of scarcity, out of necessity. The contrary doctrine is maintained only by very weak authorities. That such sale does not constitute slavery, is the authentic opinion.*

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* See Prin. Slavery 1.

Q. 2. According to Law, what circumstances are essential and necessary to the ceremony of emancipation?

R. 2. Words indicative of the act of emancipation are sufficient to give it effect, in whatever language expressed. It is not at all necessary, or essential, to execute a deed, or to use any formalities on the occasion. Emancipation how effected.

CASE IV.

Q. It is a well known principle of Law that free persons cannot on any account be sold; yet it appears to be a generally received opinion that the selling and purchasing of mankind, in times of distress or difficulty, are allowable. Does the latter doctrine rest on any legal foundation?

R. Although it is doubtless the most received and authentic doctrine that, generally speaking, purchase confers no right of dominion over mankind, yet it is laid down in certain works of authority, such as the *Inaya*, the *Zukheera* and the *Moheet*, as a tradition of *Imam Moohummud*, that a person is at liberty to sell his own freedom in times of difficulty and distress, when hard pressed by his creditor.* The following is an extract from the *Inaya* :—" A person put a question to *Imam Moohummud*, requesting his opinion as to the sale of the liberty of a freeman, when perishing from famine. He replied, that under the circumstances stated, the sale is allowable; otherwise not.—A second question was put to him as to the right of concubinage, possessed by the purchaser of

* The doctrine here maintained seems to conform to that of the Civil Law,—" Slavery was created thirdly by sale from others or themselves, for persons of above twenty years of age might sell *themselves* to slavery."—*Brown's Civil Law, vol.* 1, *page* 57.

a woman under such circumstances; he answered, that it is lawful, and that the parentage of the child begotten on her is established in the purchaser, and so likewise if such purchaser had sold her to a third person." It is laid down in the *Zukheera*,—" A free person is competent of his own will and accord to sell his own liberty, at a time when he is in pecuniary difficulties and his creditor demands payment, having recourse to violent or compulsory measures." It is also written in the *Moheet*,—" It is not lawful for a man to sell his liberty except when he has no other means of discharging a debt which he owes, or except when he is reduced to such distress as to make it necessary for the preservation of his life, or except in a time of famine, when from extreme hunger he would eat carrion or human flesh; to avoid which it is better that a man should sell himself into salvery. From this cause people sold their liberties in the time of Joseph." According to the foregoing authorities contained in the *Moheet* and the *Zukheera*, and the traditionary doctrine of Imam Moohummud cited in the *Inaya*, it is generally admitted that freemen are competent to dispose of their own liberties by sale, in cases of extreme distress.*

It is lawful for a freeman to sell his own liberty in a case of extreme distress.

CASE V.

Q. Does the estate of Inayut Oollah go to the widow of Wasil Beg, who was educated by the deceased proprietor?

No description of slave can inherit property.

R. It appears that Wasil Beg, was not the son of the deceased proprietor but merely an *elevè* of his, without any tie of relationship, and was purchased by him for a sum of money. The estate left therefore by the deceased proprietor, according to Law, does not devolve

* See Prin. Slavery 17.

NOTE.—Vide Case II, wherein such sales are pronounced " *improper*."—ED.

on the widow of Wasil Beg. In the *Mujma-ool Burkaut*, treating of impediments to succession, it is stated,—"Slavery is an impediment to inheritance; and there is no difference in this respect whether the claimant be a pure slave, totally destitute of any thing approaching to freedom, or whether he may have been partially emancipated, such as a privileged or licensed slave, or the mother of offspring, nor according to *Aboo Haneefa* one emancipated by his half-owner."*

CASE VI.

Q. A prostitute hires the daughter of another woman, as a slave, for the sum of twenty rupees, and causes her to follow the same line of life as herself. Is such transaction lawful?†

An infant being hired as a slave by his parents during his infancy, may recover his liberty on attaining the age of puberty.

R. According to Law, the transaction (as appears on the face of the deed) is not allowable, because the authority of parents over their children is restricted to the age of childhood, and after they attain puberty the parents have no authority to dispose of their persons or property; but, in the present instance, it seems that the mother let out to hire her child, while only six years old, in slavery, for the term of ninety-five years. Now after the age of puberty (the extremest verge of which is fifteen years according to Law) parents have no right of disposal, as affecting their children. This hiring therefore for the term of ninety-five years cannot, under such circumstances, be admissible. It has been declared in works of authority, that if a person has been let to hire by his parents during his childhood, he is at liberty, on attaining the age of puberty, either to continue in service or to annul the contract entered into by his parents, by emancipat-

* The question in this case supposes that the slave was such in the strict and legal acceptation of the term. For the disqualifications attendant on the state of slavery. See Prin. Slave. 11.

† Mr. Sevestre at page 451, Vol. V. of his Reports of the Sudder Dew. and Niz. Ad, has inserted a very interesting case of this sort of contract disposed of by the Calcutta Court on the 10th July 1858, wherein the illegality and criminality of such contracts under the Moohummudan Law and British regulations were fully discussed. The opinions recorded show that the provisions of Act V of 1843 are not sufficiently comprehensive to prevent such immoral engagements. Mr. Toogood's letter of the 13th April 1858, at p. 499 of the same Volume

ing himself from bondage. Besides the life of a prostitute is exceedingly reprehensible, and it can never be tolerated that a person of this description should hire another to make her follow the same pursuits. The authorities for the above doctrine are as follow :—Extract from the *Tuhzeeb* cited in the *Futawai Ibrahim Shahee*,—"It is allowable for a father, a grand-father or for mothers to let out to hire an infant, but when it attains puberty, it may either affirm or annul the contract." So also an extract from the twenty-third chapter of the *Yunbooa*, a commentary on *Tuhavee* cited in the *Ibrahin Shahee*, at the conclusion of the chapter on guardians,—"When an infant shall (be able to) understand the period of a lease, it is optional with him to confirm or to annul it, provided it affects his person, but, if it affects his property only, it is not optional with him to set it aside, nor can he rescind a contract of sale entered into during his minority.*

CASE VII.

Q. A person has a family by his wife, and also a family by one or two concubines, to whom he was not married. These concubines were slave girls, but it is not clear whether they were the property of the person in question, or of another. The question is, can the issue of those concubines inherit the property of their father on his death?

Children begotten on the unmarried slave of another are illegitimate and belong to her proprietor.

R. Children born of a concubine, who was the slave of another, and to whom the father was not married, are not entitled to inherit his property; and the reason is, that, being the fruit of fornication, their parentage cannot be established in that person, and secondly, be-

throws additional light on this species of slavery. Another case also occurs at page 308, Vol. V, Dec. S. D. A. N. W. P. The parties in that however were Hindus.—ED.

* This of course implies that the persons who entered into the contract on his behalf were his legal guardians.

NOTE TO CASE VI.—A Contract of Sale entered into during minority is only binding in certain Cases. Vide Case II Prec. and 15 Prin. of Guard. and Min. —ED.

cause, leaving fornication out of the question, the children begotten on the slave girl of another person are the property of her master, and this being the case, they can have no claim to the property, because slavery is one bar to inheritance. If the concubine were the property of the father, and either she or her mother had been made captive in an infidel country, and had been duly subjected to slavery, the connection without marriage is legal, and the parentage of her offspring would vest in the father, if he claimed them, and after his death they would be entitled to a portion of inheritance. But if she had not been duly subjected to slavery by being made captive in an infidel country, as above described, such concubine is not a slave in the legal sense of the term, and connexion with her is unlawful, without marriage; nor will the parentage of her offspring be established in the father, because it is a requisite condition in the establishment of parentage that there should be a *consort;* and consorts are either principle or inferior. A wife is of the first description, the parentage of whose offspring is established in the husband independently of any claim on his part, and cannot be disavowed by his denial. A slave is of the other description, the parentage of whose offspring is not established in the father without claim. The right of inheritance depends on the establishment of parentage; consequently the children of such concubines are not heirs.*

But begotten on the unmarried slave of the father are legitimate.

CASE VIII.

Q. The slave girl of a *Moosulmaun* (the right to whom he had acquired by inheritance) married the slave of another person, and both the wife and husband took up their abode in the house of the proprietor of the female slave, where she brought forth children in consequence of the matrimonial intercourse. The proprietor of the male slave

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NOTE.—Vide Case XIX, Prec. of Mar., &c.—ED.

superintended the marriage ceremony and defrayed all the expenses attendant on the occasion, inclusive of the usual donations presented to the bride's mother. Under these circumstances, whether is the proprietor of the female slave or of the male slave entitled to the proprietary right in the issue of the marriage? Has the mother of the female slave any right to take pecuniary donations and to contract her daughter in marriage, she herself being the slave of the person who is proprietor of her daughter?

The issue of a married male and female slave belongs to the proprietor of the latter.

R. Under the above circumstances, the mother of the slave girl was not entitled to receive any pecuniary donation in consideration of her daughter's marriage, or to dispose of her in marriage. The contract, to be complete and binding, must have the approbation of the proprietor of the female slave, but his consent is inferred, as on receiving intelligence of the marriage, he did not oppose it in any manner or object to its consummation. The proprietor of the slave girl has the absolute right to the issue of the marriage, and the master of the male slave can prefer no legal claim.*

CASE IX.

Q. 1. According to the *Moohummudan* Law, if a child is born of a female slave, purchased by her proprietor, is such child the property of the mother, or of her master?

Of the issue of female slaves in general.

R. 1. According to the *Moohummudan* Law, the term slave signifies a person who has become the property of a *Mooslim* by capture in an hostile country, or descendants from such captives. Children born of such women are the property of their masters. It is stated

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* See Prin. Slavery 16.

in the *Shurhi Viqaya, Hidaya* and other authorities,—"The embryo follows the mother both in slavery and emancipation."

Q. 2. Is it lawful to dispose of by sale, or to deposit as a pledge any human being?

R. 2. No human being who is in a state of freedom can be a fit subject of sale or deposit; according to the *Shurhi Viqaya,*—"The sale of a freeman is void. To deposit as a pledge a freeman is an invalid act." Sale or pledge of a freeman.

CASE X.

Q. A freewoman having attained the age of majority, that is to say, being fifteen years old, voluntarily, and by her own choice, contracts matrimony with a slave, and they live in the same house together, as husband and wife, for the space of a year and a half. Can such marriage of a freewoman with a slave, be considered a legal and valid contract?

R. The marriage of a freewoman with a slave is legal and valid. This opinion is in conformity with the doctrine maintained in the *Qoodooree,*—"When a slave, by the consent of his master, marries a freewoman, he is responsible for her claim of dower, and he may be sold in satisfaction thereof."* Of the marriage of freewoman with slaves.

CASE XI.

Q. A woman of the *Hindoo* persuasion resides in the house of a *Moosulmaun* and becomes a convert to the faith of *Moohummud*. After such conversion she takes up her abode with a *Rajpoot,* lives with him as his concubine, and has by

* See Prin. Slavery 14. But the offspring of such marriage are slaves and belong to the master of the husband.

him a daughter, who is living, as are also both her parents. Under these circumstances, to which of the parents does the daughter belong? If the daughter belongs to the *Rajpoot*, is he entitled to sell her to another or not? If he is entitled to do so, can the purchaser of her, dispose of her to another by sale; and if, during her minority, she lives with the purchaser, is she, on her attaining the age of maturity, at liberty to free herself from slavery or not? According to the *Moohummudan* Law, what sort of slaves are fit subjects of purchase and sale?

The parents of an illegitimate child have no right to sell it into slavery.

R. The daughter having been born in a state of freedom, her parents are not proprietors of her, but the mother is entitled to the charge of her person until she attain the age of puberty. Neither of the parents is permitted to sell such child, and whosoever purchased it, the purchase is null and void; as mankind is originally free and is not a fit subject of slavery, except in a case of *Isteela*, which obtains when a *Moohummudan* ruler subdues the dominion of infidels and makes captives of its inhabitants, both male and female. If they become converts to the *Moohummudan* religion, their lives should be spared, but they will continue in a state of slavery in consideration of their original infidelity. In this case the ruling power is invested with authority to dispose of them by sale or gift. According to the *Moohummudan* Law, therefore, slavery can originate in one way only, namely, by *Isteela*, as above defined; and there are three descriptions of slaves—*Mumlook* or acquired, *Mowroos* or inherited, and *Mowhoob* or given. The offspring of these three descriptions of slaves are termed *Khânêh Zad* (viz. born in the house), and they continue in a state of slavery, unless emancipated by their masters.

Of *Isteela*.

CHAPTER IX.

PRECEDENTS OF ENDOWMENTS.

CASE I.

Q. Can an individual assign, in payment of his wife's dower, lands which have been appropriated to a religious endowment? Have the partners in the property so assigned a right to claim it? and if so, is the assignment of it in dower rendered null and void? and, supposing any of the partners in the property so assigned to acquiesce in and assent to its being assigned in payment of dower, will the act of such person be good against her heir?

R. In Law, property appropriated to an endowment, is neither a fit subject of inheritance, nor of sale, nor of dower,* because, according to the received opinion, a thing so appropriated is the property of no individual, but appertains to the Almighty. If the trustee of an endowment should have made an assignment of the nature alluded to, he should be deposed, on account of his breach of trust. The ruling authority has the power of appointment in the absence of the appropriator or his executor. The dower of a woman is a just debt; and cannot be extinguished without payment, or relinquishment on her part. As property appropriated to an endowment is not a fit subject of inheritance, a claim founded on partnership by right of inheritance is inadmissible. If any one assign property so appropriated, in payment of his wife's dower, and the trustee acquiesce in such assignment, he should be deposed, on account of his breach of trust; and after his be-

Endowed property cannot be inherited, sold, or assigned in dower.

And should be resumed when so disposed of, and trustee removed.

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* See. Prin. End. 2.
And App. Tit. End. 25.

ing so deposed, the ruling power should appoint in his place another trustee, who will be competent to reclaim the lands so appropriated, which had been assigned in payment of dower.

CASE II.

Q. 1. Has a superintendent the right of selling endowed lands, for the purpose of defraying the expenses attendant on the repair of the buildings of the endowment?

Sale of endowed lands by a superintendent when admissible.

R. 1. Generally speaking, the gift or sale of endowed lands is illegal. It is incumbent on the superintendent to apply the profits of the lands, in the first instance, to defray the expense of repairing the buildings of the endowment, and the surplus may be applied to other purposes connected with the institution; although the person who founded the endowment may not have specified the repairing them as a condition. If the profits of the lands are not sufficient to cover the expense of necessary repairs, the trustee is at liberty to dispose of such portion of the lands as may enable him to effect this purpose, because the preservation of buildings is, in all cases of endowment, a matter of indispensable necessity.*

Q. 2. Supposing the superintendent, under pretence of applying the proceeds to the repairs of religious edifices, disposes of the endowed lands, but in reality applies the proceeds to other purposes, will such sale be upheld or set aside?

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* But sale should not be resorted to so long as any other method of realizing the necessary funds may exist, and even in that case judicial authority should be obtained. This is agreeable to the opinion of *Hisaboodeen-ul Bokharee* cited in the *Futawai Hummadea*, and other works.

R. 2. The reply to the first question will show, that a sale of endowed lands made by a superintendent, for purposes other than to defray the necessary expenses of repairs, is illegal. Therefore, a sale being made, and the proceeds being applied to other purposes, it will be set aside, and the superintendent should be deprived of his office, for breach of trust.* Rule where proceeds are misappropriated.

CASE III.

Q. 1. Certain lands were conveyed by royal grant to the superior of an endowment to hold generation after generation, and the produce to be appropriated to the maintenance of himself and the religious endowment. The grantee died childless. In this case, has his mother, or have his sisters, any legal proprietary right to the lands granted as above; and if so, in what proportions?

R. 1. Royal grants are of two descriptions. The one is called *Altumgha* and is made for personal purposes. To such an estate, on the death of the grantee, the sharers and residuaries succeed to their legal portions according to the Law of Inheritance. The other is made for charitable and religious purposes and is termed *wuqf*. With respect to the latter no claims of inheritance are admissible; and, after the death of the superior, his mother and sisters have no better title to the succession in proprietary right than any other persons. In the award of shares to persons entitled to participate in the benefit of an endowment, the Law makes no distinction between males and females. A partition of the endowment itself is illegal, but a partition of the profits arising therefrom is allowable.† Of *Altumgha*. Of *Wuqf*. *Wuqf* property not partible. But proceeds partible.

* See Prin. End. 2, 3, 5.

Vide App. Tit. End. 38, wherein it was ruled that *any* alienation of Wuqf lands is illegal.—Ed.

† Vide App. Tit. Inh. 75.

Q. 2. The superior of an endowment having obtained a royal grant of certain lands for the support of a religious and charitable institution, and for his own maintenance, died childless. On his decease, his half-brother sued his widow to recover the said lands, and obtained a judgment from the ruling authority, (not the king) that the lands should be held jointly and in equal proportions between the litigating parties, on the condition that they and their respective heirs should abstain from future dispute. In this case is such partition allowable, and if so, will it hold good during the life-time of the parceners only, or will it be binding against their heirs also?

By order of any ruling authority.

R. 2. It is lawful in the ruling power to confer on the half-brother of the deceased superintendent the possession of the lands in question, and to award a partition of the profits in favor of the widow and daughters as a charitable donation; because the ruling power is in such cases authorized to order a partition of the profits, though incompetent to direct a partition of the endowment itself.

Q. 3. After the partition above alluded to, will a gift made by the widow of her portion to her daughters be good and valid?

But gift of proceeds by grantee invalid.

R. 3. As the widow had no legal right to the property acquired by her at the partition, and could have succeeded to it only as an object of charity, her gift of such property to her daughters is illegal; besides, by so doing, it would be making a gift of profits, and a gift of profits is null and void.

Q. 4. If, after the partition as above stated, a second royal grant should issue of the same tenor as the first,

conferring possession on the son of the half-brother of the superior, will the benefit of partition and right of inheritance conferred on the widow and daughters by the intermediate award of the ruling power, be rendered inoperative and be annulled by the subsequent royal grant?

And partition not annulled by the appointment of another superior.

R. 4. If the second royal grant is similar in purport to the first, merely appointing a superior, without making any mention of the partition, it cannot be held to annul the intermediate award of the ruling power; because the widow and daughters of the first superior have no legal right of inheritance; the benefits to them arising out of a charitable donation, which, without some very cogent reason, it is illegal to defeat.*

CASE IV.

Q. 1. Moohummud Rufeeq was made superior of a certain endowment, and by the grant which conferred the office, it was declared heritable by his *furzundan* or offspring. At present the daughter of his grand-son in the male line, and the grand-son in the female line of his grand-son in the male line, are in possession of the office. Now the great-grand-son in the male line claims the office, on the plea, that the first of the two occupants is a woman, and therefore incompetent to its duties, and that the second cannot, according to Law, be enumerated among the offspring of Moohummud Rufeeq. Can therefore the grand-son in the female line of the grand-

* In the original question and answer to this case, the offices of *Mootuwulee* or superintendent, and of *Sujada nisheen* or superior, seem to have been confounded, although the offices are, in point of fact, entirely distinct. See Note to Precedents of End. Case 9. The different offices however may have been held by the same individual, as there is nothing incompatible in their union. To avoid confusion, I have rendered the term by that of superior only, being the term made use of in the first question.

son in the male line be enumerated among the offspring? and are females competent to the duties of such offices?

R. 1. Under such circumstances, the grand-son in the female line of the grand-son in the male line cannot be enumerated among the *furzundan* or offspring or lineal descendants of Moohummud Rufeeq; because when these terms are applied relatively to a person, they mean only those who are the lineal descendants of that person, or his descendants in the male line for three generations, and even lower: but the grand-son in the female line takes his descent from his own father, and not from Moohummud Rufeeq, as appears from the *Aulumgeeree*,—"If a person say, I have appropriated this land for the benefit of my descendants, all the generations will inherit, without regard to sex, on account of the general signification of the term "descendants," and so in the *Khizanut-ool Mooftieen*,—"If a man appropriate an estate to be enjoyed by his descendants in perpetuity, so long as the race continues, and he leave children and children of his male children, it will be divided among them equally, and no preference will be shown to the males over the female, because the appropriation declared them equally entitled. But the children of females are not reckoned among the lineal descendants according to the approved doctrine. Such also would have been the case if the property left had been a bequest, instead of an appropriation; and it has been ruled according to this doctrine, because the decendants of a man's daughters are not the lineal descendants of that man, lineage being derived from the father, not from the mother." Females are not competent to assume the office of superior of an endowment; and such an act is at variance with the usages of the country, because it is the duty of the superior to instruct and guide his disciples, to teach his scholars,

A descendant in the female line is not ranked among the *furzundan* or offspring of his ancestor.

A female cannot be superior of an endowment.

and to keep their company continually, in private and in public, and this cannot be done with propriety by a woman, whose duty it is to live retired and secluded.

Q. 2. In the grant obtained by Fyazool Islam, the grandson of Moohummud Rufeeq, it is stated that the offices of trustee, controller aud superior of the endowment is continued and confirmed in him and his offspring. Under these circumstances, do his daughter and the son of his daughter fall under the denomination of offspring ?

The offices of superintendent and superior being confined to a man's offspring (*furzundan*), his daughter cannot succeed, being a female, nor her son, he not being of the *furzundan*.

R. 2. The grant obtained by Fyazool Islam restricts the offices of superintendent, controller and superior of the endowment to him and his offspring. His daughter is enumerated among his offspring, because that is a general term, and includes both sons and daughters equally; but she is nevertheless excluded from the operation of the grant, which provides for the performance of the duties of superior, to which she is incompetent. The son of his daughter is also excluded, according to the approved doctrine, because the expression "offspring of a person" applies to the person from whom the lineage is derived, and the daughter's son does not derive his lineage from his maternal grand-father, but from his own father; as appears from the *Aulumgeeree*,—"I have appropriated this land for the benefit of my son and my son's son: the son who is the issue of his loins, and the son of his son, whether living at the time of the appropriation or born subsequently, will take possession, for they are both equal in point of right; but a descendant lower than two generations cannot participate in the possession, nor can the sons of daughters, agreeably to the approved doctrine: according to which cases are ruled." The same opinion is maintained in the *Moheetoo Surukhsee*.

Q. 3. It appears that Shakir Ali Khan conferred on Moohummud Rufeeq, the spiritual care and direction, the superintendance and charge of the scholars of the institution, and indigent persons, of the endowment, together with charge of the seminary and endowment, and the dwelling-houses attached thereto; and also conferred on him the office of preacher and lecturer: and having constituted him his sole successor, vested him with plenary and absolute power therein. He also divided the appropriated funds assigned for the maintenance of himself, his descendants and family, and gave them to his son Moohummud Rufeeq and others. He, the said Moohummud Rufeeq, at his own request, obtained a grant of the offices of trustee and superior of the endowment, restricted to his own offspring; and, having assigned more than half the funds appropriated for his own maintenance, to the use of the endowment and college, and to the support of the offices of superior and superintendent, died. Under these circumstances, are the offices of superintendent and superior, legally restricted to the descendants in the male line of Moohummud Rufeeq? and can the grandson in the female line, be enumerated among the male offspring or lineal descendants of that person?

A female is competent to the office of superintendent of an endowment.

R. 3. Although it is allowable to confide the trust of a pious endowment to women, as well as to men, yet, in this case, it has been clearly ascertained, that Moohummud Rufeeq caused the offices of superior, and superintendent to be centred in his own offspring exclusively, without making any distinction. It is necessary therefore, that all the duties should be performed by one person, but it is necessary also that this person should be one of the male descendants of Moohummud Rufeeq, for, as was before mentioned, it is not customary to invest females with the office of superior of en-

dowments. The grandson in the female line cannot be enumerated among the offspring or lineal descendants of Moohummud Rufeeq, as was shown above. Therefore, according to established usage, he, of the male offspring or lineal descendants, who is most worthy, will be entitled to succeed to the offices in question.

CASE V.

Q. The inhabitants of a certain village formed a subscription among themselves, and having collected the sum required, built a *mosque,* accompanied with suitable places of worship on the *ayma* or rent free lands, of a certain *Fakeer.* Have the builders of these edifices a right to appoint any other *Fakeer* to collect the offerings there presented, or has the *Fakeer,* on whose land the edifices were built, a right to make the collections and to exercise general superintendence? Supposing the builders to have the right of appointment, has the son of the person appointed by them, an hereditary right to succeed to the office of superintendent, on the death of his father, or have the builders in such case a right to appoint another successor. Supposing the *Fakeer* to have the right of superintendence, on whom will the office devolve on his death; on his son, or on some other person?

Case of a mosque, built without the consent of the land owner.

R. Both land and building are included in the term *mosque.* It is neither simply land nor simply building, but it comprizes both. The land is the chief part of it, because the foundation of the *mosque* stands upon it, and the superstructure is dependant on the land. Under these circumstances, without the consent of the *Fakeer,* who is the landlord, the building cannot in the legal sense be termed a *mosque*; because no one is at liberty to erect a building on the land of another without that other's consent, and if he do so, the Law sanctions

And of the land owner's appropriating his land for the purpose.

its being razed to the ground. If the *Fakeer*, who is the landlord, consented that the subscribers should build and endow a *mosque*, and appropriated his land for that purpose; in this case the subscribers and the *Fakeer* are participators in endowing the *mosque*, the former by contributing the building, and the latter by contributing the land. He who makes the appropriation has the patronage of appointing a superintendent; but as in this case they all unite in making the appropriation, the patronage is vested in them all collectively, not individually; and the *Fakeer* and the subscribers must unite in nominating a trustee, for the purpose of collecting the appropriations, offerings, and other profits, and applying them to the use of the endowment. If

And of its being erected by others for the land owner's benefit.

the *Fakeer* had said to the subscribers, that he was a poor man, and not able to bear the expense of erecting a *mosque*, and had requested them therefore to erect one on his ground for his benefit, in order that he might endow a *mosque*, and the subscribers agreed to do so; in this case the building is the property of the *Fakeer*, and he alone is considered the person who makes appropriation. The right of appointing a superintendent in such case, rests with him, and after his death, the right devolves on his heir. Under these circumstances, if the subscribers have built an edifice on the lands of the *Fakeer* without his consent, let them either present it to the *Fakeer* for the purpose of its being appropriated and endowed by

Rule in the first case.

him as a *mosque*, or let them raze it to the ground, because no person is at liberty to build on the land of another, as was above stated. He, who makes the appropriation, has the right to appoint a trustee, and he may appoint whomsoever he like, and after him his heirs. Authorities: *Kazee Khan*,— "The appropriation of a superstructure without its basis is not allowable; an edifice independently of its foundation is not a *mosque*." *Shurhi Viqaya*, — "If

any one build or plant on the land of another, let the thing built or planted be razed or rooted out." *Khizanut-ool Mooftieen*,—"He who makes the appropriation has the patronage of the endowment; after him his executor, unless they are excluded by being or becoming profligate; in which case they will be deprived of the patronage, which will be vested elsewhere; but it will revert to them should they return to virtue, and if, after having appointed a superintendent, the founder desire to remove him, he is at liberty to do so, and assume the superintendence himself." *Hidaya*,—"If a person usurp land and build and plant thereon, he will be desired to eradicate and raze his plants or buildings. The patronage is vested in him who makes the appropriation, and after his death in his heirs."

The patronage of an endowment in whom vested.

Exception.

CASE VI.

Q. Roushun Shah, died possessed of a cemetery and an *Imambara*, leaving a son and a daughter, the defendant and the plaintiff in the present case. It appears, from the defendant's admission, that, on the death of his father, he took possession of the aforesaid property and realized the sum of one hundred and fifty rupees by permitting the performance of the rites of sepulture in the burial ground; part of which sum he laid out on buildings attached to the ground and on charitable purposes, and the remainder of which he applied to his own use. The law officers, on being before consulted, declared that *unless* the property in question had been formally appropriated as *wuqf*, the plaintiff is entitled to a third share of it; but it was not distinctly stated that she is entitled to any part of the property in dispute, or to any part of the profits realized therefrom, and if so, whether her portion is to be deducted from the gross receipts or from the net pro-

fits; the plaintiff alleging that her consent was not obtained to the expenditure of the profits.

Cemeteries and religious buildings are inheritable, if not *wuqf*.

R. It appears that the owner of the cemetery and of the *Imambara* converted the former place into a source of personal profit, by permitting the bodies of strangers to be buried there for a pecuniary consideration, in the manner of sale or hire. Legally, therefore, such places are fit subjects of transfer and inheritance, and should devolve on all the heirs of the former proprietor. The plaintiff is further entitled to obtain her legal share of the profits, after deducting such portion as may have been actually expended in the manner stated by the defendant.*

CASE VII.

Q. Is it permissible according to Law, to make any division of the lands, or distribution of the revenues belonging to the shrine of a saint, or should they remain in the exclusive possession of the superior of the endowment?†

R. If the revenues belonging to the endowment be derived from lands or other property, which admits of the realization of profits, without detriment to their source, the appropriation of them to religious purposes must be considered as intended for the consumption of their produce only: on the other hand, if they consist of other property, such as money, or food, they are held to be of the nature of pious offerings, and charitable donations. In the former description of property, the

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* An erroneous opinion appears to be entertained that all property destined to religious purposes necessarily partakes of the nature of an endowment; but, in point of fact, no property should be considered as such, unless specially appropriated by the owner. It was doubtless under the erroneous impression here alluded to that the above question was put.

† Note.—Provision made for the reading of the Koran at, and lighting of, the tomb of a testator, cannot be looked upon as creating Wuqf property. Vide. App. Tit. End. 56.

right over the produce only vests. In the latter, the appropriation is considered to confer an absolute right to the thing itself. Charitable donations should be distributed among the heirs of the departed saint, who have charge of the endowment, and if there be none, among the servants of the endowment. The profits also of the endowment belong of right to the heirs, and should be distributed among them, but the Laws of Inheritance do not obtain in this species of distribution. On the contrary, all the heirs take *per capita*, that is to say, the profits will be made into as many shares as there are sharers, nor will the portion of one be greater than that of another, supposing them all to be equal in knowledge and piety. This doctrine is maintained in the *Hidaya*. The offerings which people present at the shrines of departed saints belong to their heirs, and it is necessary that profits so accruing, should be distributed among them alone, and the share of one should not exceed that of another unless in a case of superior knowledge, and piety. If there are no heirs, the servants attached to the establishment have a right to the offerings, and if there be no servants, they should be distributed among necessitous Moohummudans. The Law requires, in these cases, that a trustee or superintendent should be appointed, as well to guard against any misappropriation of the proceeds, as to prevent disputes arising among those who are justly entitled to them. The authority of a superintendent or trustee is legal, supposing his nomination to have been acquiesced in by all the heirs. There is considerable difference of opinion as to the validity of an appointment which may not have been confirmed by the ruling power or by judicial authority. The author of the *Moozmirat* in the chapter treating af appropriations, observes that all the persons entitled to participate in the profits of an appropriation should join in nominating a superintendent or trustee, without reference to the ruling power or

Offerings made to a tomb belong to the deceased's heirs.

And in their default to the servants of the establishment.

Superintendent by whom elected.

judicial authority; but ancient authors do not recognize the legality of such a trust. Modern authorities, however, concur in the opinion above quoted, by reason of the oppression and extortion so frequently practiced by modern rulers. It is better therefore that the whole fraternity should unite in electing a superintendent.

CASE VIII.

Q. 1. What is the meaning of the term *Mootuwulee* or trustee, and is the *Towleeut* or trust an office. If it be an office, for what purpose was it constituted, and is the possession of the trustee in virtue of proprietary right, or on what tenure does he hold the property ?*

R. 1. The meaning of the term *Wuqf* or appropriation, must be defined before that of *Mootuwulee* or trustee, and *Towleeut* or trust. *Wuqf* is this—a person makes an offering of his property to certain worthy objects, in order that they may derive benefit from the enjoyment of the profits thereof; and having done so, it becomes incumbent on the founder of the appropriation, in the first instance, and, secondly, on the ruling power, to appoint some particular individual to take charge of the property appropriated, and to prevent its being improperly alienated, or applied to purposes not in the contemplation of the appropriators. The officer so appointed, either by the ruling power or by the appropriator, is termed a *Nazir* and *Mootuwulee* or superintendent and trustee. From this it is evident that the *Mootuwulee* is an officer whose duty it is to attend to the due distribution of the proceeds of an endowment. *Towleeut* is the term applied to the office. Of the fact of its being an office, the legality of removal and appointment of the persons filling it furnishes sufficient proof. It is stated in the *Hidaya*, at the conclusion of

Of the office of *Mootuwulee* or Superintendent.

* Note I.—A female may act as *Mootuwulee* and discharge the duties by proxy. App. Tit. End. 28.—Ed.

Note II.—A Mootuwulee has power to remove the servants of a Mosque for neglect of duty. App. End. 55.—Ed.

the chapter on appropriations, that "If an appropriator who reserves the authority to himself, be a person of infamous character and unworthy of confidence, or if he constitute another of bad character the trustee, the ruling authority may take the appropriation out of their hands." From what has preceded it is evident, that the possession of a trustee or superintendent is not in virtue of proprietary right, but merely for the purpose of securing the attainment of the objects contemplated by the founder of the appropriation. The trustee, nevertheless, if he belong to such class of persons as are entitled to participate in the benefit of the appropriation, will not be excluded from a share.

Q. 2. Several villages and bazars were appropriated to the support of the shrine of a celebrated saint and his descendants. There are twenty persons belonging to his family, of whom several have children and grandchildren; others are childless. Under these circumstances, should the profits of the villages, &c., and the offerings made to the tomb of the departed saint be divided exclusively among the twenty persons above mentioned, or should any portion be given to their families also; and if so, in what manner should the profits be distributed?

R. 2. The profits of the appropriations should be distributed equally among the twenty persons mentioned in the question. If any one of them die childless, a proportionate increase will be made in the shares of the survivors. The children of those twenty individuals will not be entitled to any portion of the profits so long as their respective ancestors survive—but, on the death of any one of the twenty persons, his family will receive such portion as the deceased received during his lifetime. They will take *per stirpes* and the

Rules for apportioning the proceeds of an endowment among several grantees and their respective families.

division among themselves will be *per capita*. This doctrine is maintained in a variety of Law authorities. It is laid down in the *Khizanut-ool Mooftieen*,—" A person made an appropriation of a village, on the condition that the profits should be enjoyed by *Zeyd* and his offspring, generation after generation: in this case each branch of lineal descendants will share alike, whether consisting of one individual or of many persons; and the profits will be enjoyed by the descendants in this manner until the lineage becomes extinct, the nearer descendants continuing to exclude the more distant whose ancestors are alive; and on the death of one ancestor leaving a family, his family succeeding to the portion enjoyed by him. Where one of the sharers dies childless his portion goes to increase the joint stock, and when the whole lineage becomes extinct, the appropriation should be devoted to the benefit of the poor." So also in the *Aulumgeeree*, in the second chapter treating of appropriation, a passage is cited from the *Mubsoot* to the following effect:—" A person makes an appropriation in favor of his lineal descendants who are ten in number; so long as those ten remain alive, they will each be entitled to an equal share. But if four of them die childless, and two die leaving children, and a dispute arise between the four survivors and the children of two of the deceased sharers, the profits of the appropriation should be made into six portions, of which the former are entitled to four and the latter to two."

Q. 3. Do the male part of the family receive a portion equal to or larger than that receivable by the female part?

R. 3. The daughters and sons are entitled to equal shares of the appropriation, provided the profits thereof

were not restricted to the male descendants. In the second chapter of the *Aulumgeeree* a passage is cited from the *Suraj-ool Wuhaj* to the following effect :—"If a man say I have appropriated this property to my male and female lineal descendants, his offspring, whether sons or daughters, will equally participate." Male and female grantees share alike.

CASE IX.

Q. The *Guddee Nisheen* or superior* of an endowment having died, one of his *Chelas* or disciples succeeded him in the office of superior. Is such disciple alone entitled to the whole of the estate left by the deceased, or have the other disciples also a right to interfere in the management?

R. Property belonging to an endowment is legally subject to the controul of the ruling power. It is not liable to claims of inheritance, nor can it be transferred by gift or otherwise. The appointment by the deceased of one of his disciples to be *Sujjada Nisheen*, as his successor, had allusion to religious matters and spiritual benefits, without any reference to temporal concerns. The representative of the deceased, in this instance, cannot be considered as an heir to property; for there does not exist any cause which can confer upon him a right of inheritance. If it be the pleasure of the ruling power to make the endowment a subject of inheritance, Of succession to the office of *Sujjada nisheen* or Superior.

* I have not been able to meet with any English word exactly corresponding to the term "*Guddee Nisheen.*" That which I have used appears to me to approach nearer to the meaning than any other term. The *Guddee* or *Sujjada* is the carpet on which the Moohummudans kneel in the act of prayer. The meaning of the term *Sujjada Nisheen*, which is synonymous with *Guddee Nisheen*, is thus given by Meninski. "*Considens in tapete sacras preces peracturus aliisque præiturus antistes.*" This officer is frequently confounded with the *Mootuwulee*, that is the trustee or superintendent of the endowment, although they are quite distinct; the one having charge of the spiritual, the other of the temporal affairs of the endowment. The office of trustee may be held by a woman, and the duties may be discharged by proxy; whereas the office of Superior requires peculiar personal qualifications. Vide App. Tit. End. 28, 31.

a new grant should be issued, in which case all the heirs will inherit in proportion to their respective shares.

CASE X.

Q. A person having been in possession, as superintendent or trustee, of a religious endowment, died, without nominating any one to succeed him in the trust. On his death his sons claim the property in question in right of inheritance. Under these circumstances, is the property a fit subject of distribution among his heirs, and if not, to whom should the care of the profits be entrusted? are all the three sons of the deceased superintendent equally entitled to claim the trust, or should it be confided to one alone?

Of succession to the office of *Mootuwulee* or Superintendent.

R. No right of inheritance can attach to the endowed property or appropriation. Consequently, the claim of inheritance preferred by the sons of the deceased is totally inadmissible. The superintendent having died, without having nominated any one of his sons to succeed him in the trust, it is competent to the ruling power or the judicial authority to appoint to the trust, one, or if necessary, two of the sons of the deceased. In conferring the trust, regard should be had to superiority of qualifications, and, supposing all the sons to be equal in this respect, respect should be paid to seniority.*

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* It is not by any means necessary that the trust and superintendence should be continued in the family of the person originally nominated to be the *Mootuwulee*. It is an office of a personal nature and not heritable; but it has nevertheless been usual to prefer (*cæteris paribus*) the late incumbent's family to persons who are entirely strangers.

CHAPTER X.

PRECEDENTS OF DEBTS AND SECURITIES.

CASE I.

Q. The heirs of a person, who died involved in debt, have signed a document renouncing all claim to the inheritance and declining to interfere with the estate, in consequence of the incumbrances exceeding the assets; which fact has been proved. In this case, should there be any preference shown in satisfying the claims of those creditors to whom the debts were contracted at an earlier period, over those to whom the debts were contracted at a later period? and is there any difference prescribed as to the order of liquidating the debts of a simple contract creditor, and those of creditors holding bonds or promissory notes of the debtor? are there any circumstances which entitle one creditor to a preference over another, or are they all entitled to equal consideration in the distribution of the assets?

Rules for apportioning the assets of an insolvent estate to satisfy the claims of several descriptions of creditors.

R. If the assets of the deceased's estate are not sufficient to answer all legal demands, and there be many creditors, they are all entitled to satisfaction, in proportion to the amount of the debts due to them respectively; in other words, he to whom a greater sum is due will obtain a larger proportion of the assets, and he to whom a less sum is due will obtain a smaller proportion. Equality will not be observed, where some debts are greater than others; but whether the debt be founded on simple contract or on a promissory note or bond, and whether it has been contracted at an earlier or a later period, are matters which do not at all affect the claims of the respective creditors. The only difference is, that the liquidation of debts contracted or acknowledged on a deathbed

sickness, should be postponed until after the satisfaction of such debts as were contracted by the deceased at a period when he was in health?*

CASE II.

Q. A person was indebted to his nephew in the sum of forty-one rupees. All his property consisted of ten *beegahs* of land. On his deathbed, being of sound disposing mind, he directed that two and a half *beegahs* of the land should be set apart in satisfaction of the above debt, and devised the remaining seven and a half to his wives, as a *Hibba-bil Iwuz*, or gift for consideration, in satisfaction of their claim of dower. The deed containing this disposition of his property was duly signed and attested; but the creditor above-mentioned was no party to it. He died about six hours after the execution of the deed. The provisions of such deed being prejudicial to the creditor, should it, according to the Moohummudan Law, be upheld, or set aside?

A debtor on his deathbed cannot devise or otherwise alienate his property to the prejudice of a creditor.

R. A person during health contracts a debt to his nephew, and also to his wives, and that person, during his last illness, devises, by a *Hibba-bil Iwuz*, or gift for consideration, to his wives, in satisfaction of their claim of dower, seven and a half of the ten *beegahs* of land, which constitute his sole property, and sets apart the remaining two and a half *beegahs* to satisfy his creditor's debt; and having executed a deed to the above effect, dies. Under these circumstances, if the property set apart for the creditor be not sufficient to liquidate the debt due to him, the *Hibba-bil Iwuz* executed by the deceased will have no validity, according to Law.

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* See Prin. Debts and Secur. 2.

The land must be sold, and the proceeds proportionally divided between the creditors and the wives, according to their respective claims*

CASE III.

Q. A person being involved in debt to an amount larger than his property is capable of satisfying, dies, leaving a wife, who, on his decease, claims her dower out of the estate, and other creditors come forward who claim to have their debts satisfied from the same source. In this case what is the legal course to be adopted?

R. If the property left by the deceased be inadequate to satisfy the demands of all the claimants or creditors, a *pro ratâ* distribution must be made among them. The Law makes no distinction between a debt of dower due to a wife and debts due to other creditors. All debts (contracted in health) are of equal validity, except those of mortgagees or pawnees, that is to say, persons with whom the property of the deceased may have been deposited in mortgage or pledge. The claims of such persons are entitled to priority,† and they are authorized to satisfy their own demands out of the property in their possession; after which the surplus (if any should remain) will be divided among the other claimants.

A mortgagee may pay himself out of the mortgage on the death of his debtor.

* It is a rule in law that debts are claimable before legacies, and that an acknowledgment of a debt in favour of an heir resembles a legacy. In this case the deceased acknowledged a debt to his wives who are his heirs, consequently his special acknowledgment in their favour is of no avail, but they are entitled to a proportional share of the assets in common with other creditors. Had the persons in whose favour the acknowledgment was made been strangers even, still the disposition would not have availed them, nor would they have been entitled to any preference in the liquidation of their claim, because every disposal of property on a death bed is considered as a legacy, which cannot extend to more than one-third of the estate, and the satisfaction of which must be postponed until after the liquidation of debts. See. Prin. Wills 6, 7.

† NOTE.—The general rule in respect to all claims is, that priority in point of time confers superiority of right. Prin. of Claims 4.—ED.

This opinion is in conformity with the *Kifaya* and other legal authorities.*

CASE IV.

Q. A Moosulmaun being on the point of death, nominates a person to be guardian of his minor children and manager of his houses, lands, and other property. The person, so appointed, borrows some money during the minority of the children, for the purpose of defraying the balances of government revenue that had accrued on their estate. During the minority of the children, the debt was not repaid to the lender. If, after their attaining the age of majority, the lender should claim his due from them and from the guardian, from whom will he receive it, from the guardian or from the wards?

Of necessary debts contracted by a guardian.

R. If, in the case stated, the lender claim his debt as due from the wards, that is to say, from those who were minors, and it be proved due without any appearance of fraud or breach of trust on the part of the guardian, he will recover from the wards. It is held in books of Law, that on account of food, raiment, and land-tax, which means the government revenue, due from the estate, it is legal and allowable for the guardian to contract debts, on behalf of his minor ward; because the guardian contracts a debt for the benefit of his ward, and the preservation of the estate, and applies the money to the necessary purposes of the ward. As the debt of the creditor was not liquidated during their minority, and as they have now grown up and are of full age, this debt must be paid out of the property of the wards, of which they are now seized and in possession.†

* See Prin. Debts and Secur. 20. † See Prin. Debts and Secur. 6.

CASE V.

Q. A person sues the widow and son of a landed proprietor for a portion of the estate left by the deceased, in satisfaction of some unadjusted claim. The widow pleads that her husband made over to her by deed and put her in possession of his entire property during his lifetime, in lieu of dower. Under these circumstances, is the whole property to be reserved in satisfaction of the dower, or is the claim on this account to be considered on a footing with that on account of other debts?

R. A claim on account of dower and claims on account of other debts are entitled to equal consideration in the order of payment out of the assets, excepting a claim on account of a debt which the deceased may have acknowledged during his last illness, and which he is not known to have *bonâ fide* contracted. Such claim should not be satisfied before the other debts are discharged. But if, as appears to be established in the present case, the property was made over to the wife and taken possession of by her during her husband's lifetime, it cannot with propriety be termed the estate of the deceased, or be considered available as such. Of a debt acknowledged on death bed.

CASE VI.

Q. A debt having been acknowledged in the same bond jointly by two persons, and one of them subsequently deceasing, is the whole debt recoverable from the surviving obligor?

R. If the parties, who joined in executing the bond, each participated in the loan, a claim to the whole will not be maintainable, against the surviving obligor. He will be responsible for his own half share only. The chapter of the Case of a joint bond, one of the debtors dying.

Doorur-ool Juwahir, which treats of loans, contains authority for this doctrine.*

CASE VII.

Q. A and B sign their names to an undertaking executed by C and D, as sureties for the punctual payment by the two latter of a debt due by them, according to instalments specified in the undertaking. On failure of the engagement, the creditor sues A, B, C and D, and obtains a decree against them collectively. B, C and D abscond, but A being arrested in satisfaction of the judgment, pays the whole amount of the debt to the creditor, to recover which sum he now brings an action against the heirs of B, his co-surety (B having died) and C and D collectively. Under these circumstances, will an action brought by the surety who has paid the debt lie against the co-surety and the original debtors jointly, and will his claim against the heirs of his co-surety be vaild according to Law; and supposing his claim to be valid against his co-surety, or the representatives of that person, notwithstanding the existence of the original debtors; and, supposing the security bond not to specify for how much the sureties were to be responsible respectively, what portion of the debt will be demandable from the estate of the co-surety B, and what portion from the original debtors C and D?

Case of two joint sureties and one of

R. The action brought by A, (the surety who paid the debt) against the heirs of B, his deceased co-surety,

* This doctrine seems conformable to the Roman Law, by which, when several persons contracted an obligation jointly, each was liable for his own part only, unless it was particularly stipulated that they should be bound in *solido*; but this is the reverse of the English Law, according to which, an obligation contracted generally by several persons is a joint obligation, unless there is something in the nature of the subject to induce a different construction and render it several in respect of the separate interests of the contracting parties.—*Evans on Pothier*, No. 11, § 2. See Prin. Debts and Secur. 3.

and against C and D jointly, will lie, provided the heirs realized any assets from the estate of their ancestor. The original debtors will, in the first instance, be liable for the debt, but, in the event of their insolvency, one moiety must be discharged by A, and the other moiety by the representatives of B, if they have assets. The Law is, that when two persons become sureties *in solido* for another, half of what the one pays is recoverable from the other, and the whole is recoverable from the original debtor, because any payment made by one operates in an undefined manner for both. Of two sureties, if one discharged the entire debt, and then come upon his co-surety for reimbursement of half, and they afterwards unite in suing the principal debtor, it is the same thing as if both sureties had originally combined to discharge the debt of the principal, one of them in person and the other through his agent; according to the *Hidaya,*—"Whatever payments either of the two may make are made in an undefined manner on account of both, and the person making such payments is entitled to exact the half of them from the other, and then they are jointly entitled to exact the whole of what has been paid, from the principal, since they paid the same on his behalf; the one making the payment immediately from himself and the other doing it as it were by substitute." But if the surety can recover by exacting restitution from the principal debtor, previously to his preferring his claim against the co-surety, he should exact the whole amount from the principal debtors. According to the *Futawa Alumgeeree,*—"If he can recover from the principal before proceeding against his co-surety, let him exact from him (the principal) the whole thousand.*"

them being compelled to pay the whole debt.

Of one of two sureties having paid the debt and realized the half of it from his co-surety.

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* The general rule is that where two persons are joint securities for the payment of a debt and one of them dies, the survivor will not be considered as surety for the whole debt. See Prin. Debts and Secur. 4.

CASE VIII.

Q. A copy of the agreement, executed by the defendant, dated the 19th of *Jumadee-oosanee* 1209, and a copy of the agreement executed by Anoop Singh, dated the 22nd of the same month and year, and a copy of the engagement entered into by the plaintiff and others in favour of the defendant, agreeing to renew the lease in the event of the profits not repaying the money borrowed; being shown to the *Kazee* of the court, he was asked whether, with reference to those documents, the transaction could be considered in the light of a mortgage taken with a view to usury?

Of an estate assigned in mortgage for the liquidation of a specific debt.

Q. On an inspection of the three documents, it appears that the lessors, mentioned in the question, gave an assignment to the defendant on the profits of an estate to endure from the beginning of 1212 A. H. to the end of 1814 A. D. on account of the sum of 2,250 Rupees, paid in advance by him, which was found to be due on an adjustment of the accounts of a former lease. The estate was in the nature of a mortgage, and it was stipulated that the profits should be employed for the reduction of the principal debt. But the defendant, who was the assignee and in possession under the assignment, let the estate in farm to Anoop Singh for the sum of 3,300 rupees. Under these circumstances in point of fact the excess sum of 1,050 rupees (over and above the 2,250 rupees) profits of the mortgaged farm must be considered in the light of usury; and it is unlawful and prohibited for a Moosulmaun to take interest openly or covertly.*

* The suit was in this instance brought to recover the excess above the debt which had been realized by the defendant from the lands of the plaintiff, and it seems but fair that the transaction should have been held to be usurious, especially as the defendant risked nothing, the plaintiff having agreed to renew the assignment in the event of the profits not proving sufficient, within the period first stipulated to liquidate the debt. It is a well known principle of

CASE IX.

Q. A person mortgaged his landed estate for a loan of twelve thousand rupees. Afterwards the mortgagor and mortgagee settled their accounts, by which there was found a balance of two thousand rupees due from the former, who, for the satisfaction of the balance, executed an agreement, assigning over the lands to his surety, on consideration of his engaging to pay the balance. The mortgagee did not return the deed of mortgage to the mortgagor, yet neither he (the mortgagee) nor the surety were in possession of the property from the time of the execution of the agreement. The mortgagor before liquidation of the debt of two thousand rupees disposed of all his right and title in the estate, by gift, in favor of his sons and executed a deed of gift in their favour. Under these circumstances, is the gift available in Law, notwithstanding the non-liquidation of the balance due?

R. The mortgagor was not at liberty to dispose of the property by gift, until the redemption of the mortgage, without the consent of the mortgagee, and by the agreement it does not appear that the mortgage was redeemed, or that the mortgagee gave his consent to the gift. The only inference that can be drawn from the agreement is that the mortgagee was willing to permit the redemption of the mortgage, on condition of the mortgaged lands remaining in the possession of the surety, who would, from the profits thereof, satisfy his

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Moohummudan Law that interest is entirely prohibited, and that the giver, as well as the receiver, of any excess above the original debt is held to act sinfully. In practice this principle is not much adhered to, and some modern lawyers have gone the length of asserting that the receipt of interest from a person not professing the Moosulmaun faith should not be accounted usurious. This however is practically a matter of little consequence, as our courts, I imagine* would not scruple to award interest in an action between two Moohummudans, where it was specifically promised, or where it was equitably due, notwithstanding the scriptural prohibition.

* NOTE.—Interest was constantly awarded. Profits of mortgaged estates are adjusted in the mode provided in Secs. VIII and IX. Reg. XXXIV of 1802, (Madras Code). Section VII as regards interest is partly rescinded by Act XXVIII of 1855, which repealed the usury laws. To elucidate some decisions on the subject it may be necessary to notice, that the Madras Sudr Udalut ruled on the 8th February 1836, that the substitution of the term "profit" "for interest" was a

claim for the son of two thousand rupees by periodical instalments. This affords no ground for rendering null and void the mortgage, which continues in full force. It is laid down in books of Law that, if a mortgagor and mortgagee mutually agree to the redemption of the mortgage, still the mortgage remains in full force, until the former, in consequence of such redemption, return the mortgaged property to the latter, in which case the contract is rescinded. It now remains for consideration, that from the period of the execution of the agreement alluded to, neither the mortgagee not the surety were in possession of the mortgaged property. By this fact it clearly appears that the property reverted to the possession of the mortgagor, and that he neither made it over to the surety nor permitted it to remain in the possession of the mortgagee. If it be proved that the mortgage was actually redeemed, and that the mortgagee restored the possession of the property to the mortgagor in consequence thereof, in this case the mortgage is null and the gift complete; otherwise, if the mortgagor made seizin without the consent of the mortgagee, he committed a trespass, from which act the mortgage cannot be invalidated nor the gift held to be valid. As is laid down in the *Hidaya*,—"Upon a person receiving a pledge which is distinguished and defined, (that is, unmixed and disjoined from the property of the depositor,) the acceptance being then ascertained, the contract is completed, and consequently binding, (until, however, the seizin actually take place, the pawner is at full liberty either to adhere to or recede from the agreement)." Now when the contract is in this manner rendered complete, the right of the mortgagee is established, and if the mortgagor transfer the property so mortgaged to another person by gift, the act is invalid; because it cannot hold good without destroying the right of the mortgagee, and it is equally

A mortgage cannot be set aside by any means, but by a *bonâ fide* adjustment and liquidation.

Authority cited on the doctrine of pawns or mortgages.

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fraudulent attempt to evade the provisions of the Laws, but this ruling has been set aside by Act XXVIII.—Ed.

obvious that if the mortgagor, by an act of trespass, dispossessed the mortgagee, the mortgage would still continue in force, because the contract is not thereby annulled. It is declared in the authority above quoted,—"If the pawner sell the pledge without the consent of the pawnee, and again, before the pawnee has signified his assent, sell it to another person, in that case whichever of these two contracts the pawnee may confirm is valid; for as the first sale is dependant on the consent of the pawnee, it cannot prevent the second from being so likewise. If therefore, the pawnee choose, he may ratify the second sale. If on the contrary, the pawner, after having first sold the pawn as above, should let, give or pawn it to another person, and the pawnee give his consent to such lease, gift or pawn, the sale which preceded either of these deeds is valid. The difference between these two cases is, that in the first (where one sale is made after another) the pawnee may derive an advantage from confirming either of them (as his right lies in the price) and whichever therefore he approves is valid. In the case of a lease or gift, on the contrary, no advantage can accrue to the pawnee, as his right lies in the return for the article, not in the usufruct. If therefore, the pawnee approve of either of these, he by consequence impliedly assents to the abolition of his own right; and the previous sale (which was suspended on his consent only because of his right) becomes valid of course." Agreeably to the above doctrine, it is evident that if a mortgagee* give his consent to the gift of the mortgage to another person, such assent implies the abolition of his own right; consequently, if the mortgagee in the present case gave his consent to the gift of the property, the gift is valid and the mortgage is re-

* The term *rahn* signifies both pawn and mortgage, and the rules by which the one description of pledge is governed are equally applicable to the other.

scinded. So also in the *Hidaya*,—"If also the pawner discharge the debt in part, still it remains with the pawnee to keep possession until he shall have received payment of the balance. In the same manner, if the pawner and pawnee should, by mutual consent, dissolve the contract of pawn, the pawnee may, nevertheless, keep possession of the pledge until such time as he receive payment of his debt, or exempt the pawner therefrom."*

CASE X.

Q. 1. A man dies, being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower, in preference to the other heirs?

A woman has a lien for her dower on her deceased husband's estate.

R. 1. If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband, except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, a prior claim† on account of her dower on the property left by her husband, whether real or personal. The residue, after her claim of dower is satisfied, will be divided between her and the other heirs, according to their respective shares of inheritance.

Q. 2. A certain deed, purporting to be a *Mocurreree sunnud* or lease in perpetuity, having been shown to the law officer, he was desired to declare, whether or not it was valid; and if valid, whether the grantee could, by virtue of it possess himself of the landed estate of the grantor?

A contract to pay the debts of a lessor in

R. 2. This *Mocurreree snnnud* is invalid, because it may be inferred from the tenor of it, that it signified a

* For the doctrine in cases of Pawns and Mortgages, see Prin. Debts, &c. 14 to 20.

† NOTE.—As a creditor for her debt of dower in common with other creditors, but not in preference to them. Vide Case XXIII. Prec. of Mar.—ED.

lease, in return for which lease it is stipulated, that the grantee or lessee shall liquidate the demands of the creditor of the grantor. In Law such a contract vitiates the lease; and even admitting the condition to be valid, the grant would expire with the grantor.

consideration of a lease is invalid.

Q. 3. Admitting, for the sake of argument, that the lease would not be determined by the death of one of the contracting parties, should the amount of the widow's dower be paid out of the property, which is now in the possession of the lessee, or, according to the terms of the contract, may the lessee pay the debts in any mode that he can, retaining possession of the lease; or should the land be transferred to the possession of the widow?

R. 3. Admitting that the lease would not be determined, still if the amount of the dower cannot be paid without the sale of the property left, the lease will be determined by a sale to liquidate the dower, and the proceeds will be employed for the payment of the dower and the other debts; and if the proceeds should be found insufficient to discharge the whole of the claims, the widow and the other creditors will share proportionately; for instance, if the amount of the dower is three hundred rupees, and the claims of other creditors amount to two hundred and the proceeds furnish only five rupees, the widow will obtain three rupees in liquidation of her claim of dower, and the other creditors will obtain two. This goes on the supposition that the estate is not mortgaged: if mortgaged, the debt due thereon must be first discharged, and the surplus shared proportionately amongst the creditors and the widow.*

When a lessor dies in debt, his estate must be sold in satisfaction.

And a *pro-ratâ* distribution of the proceeds made.

* The above opinions were delivered by the *Mooftee* of the Patna Provincial Court, and the same questions having been propounded to the *Kazee* of the Court, his replies were similar in purport, but rather more full, to the following effect:—

CHAPTER XI.

PRECEDENTS OF CLAIMS AND JUDICIAL MATTERS.

CASE I.

Q. A person being dispossessed of certain slaves, did not lay claim to them for a period of upwards of twelve years: does his dispossession in this instance operate to extinguish his right to them, as is the case with respect to other property under similar circumstances?

First,—It is not necessary that the amount of dower should be specified in writing: deeds of dower and other legal documents are merely used to preserve the memory of a transaction. Between two contracting parties a verbal stipulation is sufficient, and should the matter be contested the dower will be established at such an amount as may be proved to have been stipulated by the husband, by two competent witnesses. The claim will in this manner be legally established.

Secondly,—As this is a claim of dower, which must be satisfied before claims of inheritance, the dissent of the heirs cannot avail. The whole property left by the husband, whether real or personal, must first be applied to the liquidation of the claim of dower.

Thirdly,—This grant in perpetuity virtually signifies a contract of lease, and a lease, without a term, whether long or short, is not good or valid; and, as in a lease in perpetuity, there is no term specified, the legal condition is wanting, and, according to the Moohummudan Law, such lease cannot be valid and binding. Although this deed sets out with declaring, that the lease shall endure for a century, commencing from the year 1207, which may be construed into a long term, yet it goes on to declare, that it shall continue hereditarily to the latest posterity, which manifests a clear intention, that it is to remain in perpetuity. This condition is repugnant and fatal to the declaration of a term, and the term no longer exists. And even admitting that the term specified, namely, one hundred years, should be held to continue in force, still it can only endure so long as the contracting parties live. As this is a contract of lease, it expires and is determined by the death of one of the contracting parties, because on this point the Law is explicit, that "a lease is determined by the death of one of the contracting parties," that is to say, the lessor or lessee. Under these circumstances the property, which was leased must be held to form a constituent part of the estate of the deceased; and out of it the dower must be paid.

Fourthly,—As by Law the contract of lease expires and is determined by the death of the lessor, it is not incumbent on or competent to the lessee, to liquidate the claim of dower. The lands which were let in lease must revert to the widow of the lessor, who is both his heir and his creditor.

Note.—Vide Prin. of Claims. 6.—Ed.

R. When the right of any person shall have been established to any thing, whether consisting of slaves or other property, real or personal, his right thereto cannot be extinguished by dispossession for any length of time, whether exceeding or falling short of twelve years.* No limitation of time to bar a claim.

CASE II.

Q. The law officers were desired to inspect a certain power of attorney and to state, whether, under it, the agent had or had not a right to sell, according to the Moohummudan Law; and if he had, what illegality had occurred in his drawing up the deeds of sale, and supposing those deeds to be valid according to Law, in virtue of the authority of the agent, whether the deeds of sale and receipt had been drawn out by such agent in the form prescribed by Law; what objection was apparent, and whether the sale of the estate conveyed in those deeds was good in Law or not?

R. The power of attorney is not drawn out according to the language and form required by legal technicalities; but from its tenor it may be collected, that Chuttersal Narain made over to his son Byjnath Narain the conduct of all his affairs, and conferred on him a general power of attorney to sell, mortgage, and manage his estate. Therefore, if it be proved by competent witnesses, that Chuttersal Narain really authorized Informality in a deed does not vitiate a contract founded thereon.

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* This question seems to have been propounded with a view to the regulations of Government, rather than to the principles of Moohummudan Law. According to the provisions of the regulations, no claim for personal property can be entertained if the cause of action have arisen twelve years antecedent to the institution of the suit, nor a claim to land or other immoveable property, unless injustice or dishonesty be alleged; but even with regard to this species of property the term of sixty years is an absolute limitation in bar.† According to the Moohummudan Law, however, there is no limitation in point of time to defeat any claim of right which must be determined solely by its merits. See. Prin. Claims &c. 1 and Note.

† Note.—This is according to the Bengal Code. In Madras, adverse possession for 12 years bars all claims.—Ed.

his son Byjnath Narain to manage all his pecuniary affairs, and granted him full permission to sell, mortgage, or otherwise dispose of his property, the said Byjnath will be fully and legally empowered to sell the property. The deed of sale and the receipt are incorrect, because, from the body of the deeds, it may be collected, that Chuttersal Narain himself was the actual seller, and the person who executed the deeds, and from the words written underneath, and the *Kazee's* attestation, it would appear that the sale was conducted by attorney, and that the contractor was Byjnath, his agent. Such a paper, therefore, is not strictly a legal instrument, but should it appear by the evidenc of witnesses or by other means of proof, that the said agent or his principal did *bonâ fide* make the sale, it will be good and valid according to Law: and the former errors in the deeds, which may be attributed to the ignorance of the person who wrote them, are not sufficient to invalidate the sale.*

CASE III.

Q. A person purchased a female slave, whom he still retains in his house in a state of slavery. By her he had a son and daughter. The latter was committed by him to the possession of his sister, in whose family she now continues, performing the duties of a slave. The person above alluded to now sues his sister, to recover possession of the daughter of the female slave purchased by him, and adduces as a witness in support of his claim, the mother, who has all along remained in a state of slavery. Under such circumstances, is the evidence of the female slave, purchased as above stated, admissible, according to the Moohummudan Law?

Evidence of slaves inadmissible.

R. Under the circumstances stated, it appears that the person adduced as a witness is a female slave, but it is

* Prin. Claims, &c. 3.

a maxim in Law; that the evidence of slaves is totally inadmissible. Therefore the testimony of the mother of the slave girl cannot be received.*

CASE IV.

Q. In a matter involving some pecuniary profit and benefit to a childless woman, is the testimony of her husband or her father admissible or not?

R. According to Law, the evidence of the husband or of the father of a claimant is not admissible in a matter operating to his benefit.† **Favorable testimony by a husband or father inadmissible.**

CASE V.

Q. A sale of lands was made by a person, at a period when he was upwards of one hundred years of age. Can a contract, made at so advanced a period of life, be considered valid and binding upon his heirs; and is the evidence of the servants of the purchaser admissible for the purpose of substantiating the sale?

R. If the vender was of sound disposing mind at the time he made the sale, the contract will be binding against his heirs, at whatever period of life it may have been executed; but the evidence of a servant in favour of his master is by no means admissible.‡ **Evidence of a servant inadmissible.**

CASE VI.

Q. A dower of seventy-five thousand rupees was alleged to have been settled on Oomda Beebee (the mother of Qaim Beebee, and wife of Gholam Hoosein Khan,) at the time of her marriage with that person. The wife of Gholam Hoosein died before him, leaving her daughter Qaim Beebee, a brother

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* See Prin. Claims, &c. 10. † Prin. Claims, &c. 11.

‡ See Prin. Claims, &c. 11.

and three sisters, as her heirs. Afterwards Gholam Hoosein died, leaving his mother, his daughter (Qaim Beebee), two wives, two sons, and three daughters. Oomda Beebee, in her lifetime, neither claimed nor disclaimed her right to dower. Under these circumstances, can her heirs claim it out of the property left by Gholam Hoosein Khan? and if so, how much of it will go to Qaim Beebee, the daughter of Oomda Beebee.

R. One female witness states, that she was on the spot at which the marriage took place, that is to say, in the assembly where the declaration and consent were expressed; that the marriage was contracted in her presence; and that Gholam Hoosein agreed to pay Oomda Beebee dower to the amount of seventy-five thousand rupees. From such assertion it would at first sight appear, that this witness had actually heard the agreement of Gholam Hoosein; but on being cross questioned, she states, that she, the bride's mother, and others remained in company with the bride, and that the bride's mother sent a message to the bridegroom, desiring that the sum of seventy-five thousand rupees should be fixed as the amount of her daughter's dower, and that Gholam Hoosein agreed to be responsible for the payment of this sum; that the declaration and consent were expressed in a male assembly, and that she (the witness) was never present in a male assembly, not even at the marriage of the daughters of Gholam Hoosein. From the evidence of the witness, who speaks of a message, and of her not being in the male assembly, it is plain, that the bride did not enter the male assembly, and there make the agreement. Besides it is not customary to do so. There still remains the supposition, that this witness may have gone to the door of the room, in which the marriage was con-

tracted, and overheard the conversation, which indeed appears, from the evidence of another witness, to have been the case; but as the witness herself has not stated this, the bare supposition of it will not suffice in evidence. Besides, the witness in question is one of the heirs of Oomda Beebee, and her declaration, that she has no right to a share in the property, but that Qaim Beebee is entitled to the whole, does not exclude her from the inheritance, should she afterwards claim it; because by so doing she does not establish the right of another to her share. This is not a relinquishment, (legally speaking) and even if it were, there is considerable difference of opinion as to the effect of relinquishment. The evidence of another female witness is contradictory. Besides, her admission that she was the slave of Oomda Beebee, renders her evidence nugatory.* The evidence of the two other witnesses, one man and one woman, who heard the amount of dower fixed from a place near the assembly, in which the marriage was contracted, is good, although they were not actually present in the assembly; but they fall short of the number which the Law requires. The deed, however, stipulating the amount of dower, produced by the claimant, as having been executed by Gholam Hoosein, has been duly proved by witnesses, and has not been denied by her adversary; and even admitting, that the dower stipulated exceeds the amount of dower usually payable to females of the same family, still the agreement is binding, and, in point of fact, it has been proved by some witnesses, that the other daughters of the same family received upwards of one hundred thousand rupees, as dower. The evidence as to the acknowledgment of Gholam Hoosein, though not in itself conclusive, is nevertheless confirmatory.† The

Evidence of one heir in behalf of another.

And of a slave.

And of one man and one woman.

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* See Prin. Claims, &c. 9, 10.

† Vide App. Tit. Dower 5.

attempt to prove forgery has wholly failed. The result is, that the amount of dower has not been legally proved by witnesses present in the assembly, at the time of the contract, but the deed stipulating the dower, has been found to be good and valid, and the witnesses to it are unexceptionable. In virtue of that deed, therefore, the heirs of Oomda Beebee are entitled to take the amount of her dower out of the estate of her deceased husband. Out of the whole debt of dower, *viz.* seventy-five thousand rupees, eighteen thousand seven hundred and fifty will be deducted on account of the share of her husband; and Qaim Beebee will get half or thirty-seven thousand five hundred rupees; the widow's brother will obtain seven thousand five hundred; and her three sisters three thousand seven hundred and fifty each.

Of a daughter with a husband, a brother and three sisters.

CASE VII.

Q. A person died leaving three wives. By his elder wife he had a daughter, who died before her parents, leaving two sons and four daughters. The elder wife lived with her husband for a period of upwards of sixty years, and her death occurred some years subsequently to his, without her ever having realized the sum due to her on account of dower. By his second wife he had a daughter, who is still living, and is now the plaintiff in this action, to recover the paternal estate. His third wife died childless. The sons and daughters of the deceased proprietor by his elder wife, being six in number are still alive, and the elder son, who is the defendant, pleads in answer to the claim, in the first place, that the whole proceeds of the estate are not sufficient to answer the demand of dower due to the elder wife, which amounts to fifty thousand rupees; that, in the second place, admitting the value of the estate to exceed the sum mentioned, the defendant and his brethren, who

are children of the daughter of the elder wife (there being no other legal sharers or residuaries) are entitled to her eighth share of the property in addition to the stipulated amount of dower; and that, in the third place, the plaintiff, who calls herself the daughter of the second wife of the deceased proprietor, was, in point of fact, the daughter of the slave girl of his (the defendant's) grand-mother who was never married to his grand-father, and that, consequently, she had no right or title to succeed to any part of the property. But the plaintiff denies the truth of this latter allegation, nor can the defendant adduce any evidence to substantiate it; neither is he able to bring forward any deed showing that the amount which he claims as the dower of his grand-mother was ever settled upon her. Under these circumstances the question is; if a married woman live with her husband for a period exceeding sixty years, and during the whole of this time does not obtain from him the sum due to her as dower, nor from his estate after his decease, and subsequently die, having had a daughter, who died during the lifetime of her parents, are the children of such daughter legally competent to claim the sum due to their grand-mother on account of dower?

Dower of a deceased woman claimable by her grandchildren, notwithstanding any lapse of time.

R. Dower is a constituent part of a marriage contract, and it is an established point of Law that it continues to be a debt due from the husband, until it shall have been satisfied or remitted. The children of the daughter, who died before her mother, are ranked among the distant kindred of their grandmother, and they are her heirs, provided there are no preferable claimants, such as legal sharers or residuaries; and they are therefore entitled to claim the sum due to her on account of dower. Lapse of time is not a legal impediment to a claim of dower. Some modern Lawyers, indeed, arguing on the ground of there being many false claims preferred in these

Rules of limitation according to modern and less received authorities.

days, urge the propriety of rejecting those of very long standing. The term of limitation according to some is three and thirty years. According to others it should be restricted to a cycle, which is interpreted by some to signify thirty, and by some eighty years. Supposing then the amount of dower claimed to be established, the Law relative to limitation is as above specified. In the event of its not being established, recourse must be had, agreeably to the opinion of the two disciples, to an ascertainment of the proper dower of the defendant's grand-mother and also of the plaintiff's mother.*

CASE VIII.

Q. A person lays claim to certain property, in virtue of an alleged gift, and subsequently in virtue of inheritance. Is oppugnancy so far established as to defeat the claim, by reason of the different assertions, with respect to the mode by which the right accrued?

Case of a claim by purchase and by inheritance by the same individual.

R. There is no express rule of Law which declares that a claim of inheritance should be maintained, if made at a time subsequent to the claim of gift, but there is legal oppugnancy if the claim of inheritance be prior in point of date; as is laid down in the *Foosool* cited in the *Ibrahim Shahee*,—" If a person lay claim to a house, alleging that he had purchased it from his father, and afterwards claim it in virtue of inheritance, the claim should be admitted; but if he, in the first instance, claimed the house in right of inheritance and afterwards in right of purchase, the claim should not be admitted, oppugnancy being established." The reason of this appears to be, that the right of inheritance

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* See Prin. Claims, &c. 1, and note.

NOTE.—On the subject of limitation, vide decision referred to at page 279.

does not attach to any thing that was not the property of the deceased, at the time of his death. A claim, therefore, of inheritance supposes the right of property to be vested in the deceased at the time of his death; but, by a claim of purchase, the right is supposed to be vested in the claimant himself before the death of the former proprietor, in which there is an evident oppugnancy, the case being the same as if he had first admitted the right to belong to another, and afterwards assumed it for himself. Therefore a claim of purchase can never be entertained after a claim of inheritance preferred by one and the same individual. But it is otherwise where the claim of purchase precedes that of inheritance; because, when the title to the thing in virtue of purchase is advanced, the right thereto is maintained to have vested in the claimant before the death of the former proprietor, and, by advancing a title of inheritance, he claims the property of the deceased, which does not constitute oppugnancy of such a nature as to affect the admissibility of the claim: as is declared in the *Ibrahim Shahee*,—" Oppugnancy affects the admissibility of a claim, only where it is adduced to render null and void the acknowledged title of another individual." So also in the *Foosool Imadeeya*,—" Should a person allege that certain property belongs to such a one, and afterwards claim it as belonging to himself, his claim is inadmissible, as affecting the acknowledged interest of another." And this consequence must necessarily arise where a claim by purchase is preferred subsequently to a claim preferred in virtue of inheritance. It is laid down also in the same authority, that " if a person having property in his hands, should make use of such expressions as the following: " This does not belong to me, or I have no right title or interest therein," at a time when there was no ostensible claimant, to such property, and sub-

sequently, on a claim being preferred, the party in possession should assert that he himself is the rightful owner, it is fair and admissible, notwithstanding the oppugnancy; because, by the use of such expressions, there is no admission of a right vesting in any particular person, and oppugnancy affects the admissibility of a claim, only where it is adduced to render null and void the acknowledged title of another individual." Upon this principle, as the claim by purchase does not involve the admission of the right being vested in any other person, so the subsequent claim by inheritance does not render null and void the acknowledged title of another individual. Besides, there is no difference between a claim of inheritance preferred subsequently to a claim of purchase and a claim of inheritance preferred subsequently to a claim of gift, nor is there any difference between a claim of purchase preferred subsequently to a claim of inheritance and a claim of gift preferred subsequently to a claim of inheritance. Neither the claim of the gift nor of the purchase, involves the admission of the right being invested in any other person, which right, if acknowledged, would be rendered null and void by a subsequent claim of inheritance. But should the orders of the claims be reversed, this will occur; because by the claim of inheritance the right is admitted to have remained vested in the former proprietor up to the day of his death, which right, so acknowledged, the subsequent claim of gift or purchase is adduced to render null and void, by which the oppugnancy occasioning disability is established. In the case in question therefore the claim should be entertained, and without reference to the oppugnancy, it should be decided on its merits, according to the established mode of proceeding; that is by evidence or by acknowledgment or by refusal of purgation by oath; according to the *Ashbah-o nuzayir*,—" The decision of a

And of a claim by gift and by inheritance.

Judgment whereon founded.

Judge should be founded on evidence, or on acknowledgment, or on refusal of purgation by oath.*

CASE IX.

Q. A dispute exists between the plaintiff and defendants, the former claiming six houses which are in the possession of the latter, alleging that they are his patrimonial property. This the defendants admit, but plead that the ancestor of the plaintiff mortgaged the premises to their ancestor, for the sum of seven hundred and seventy-five rupees; they state that they have no deed of mortgage, but that the fact is recorded in the account books of their ancestor. The plaintiff replies that he had heard from his mother, who was the mortgagor of the houses and also from others of his relations, that the debt for which the houses were mortgaged amounted only to four hundred and forty-six rupees. The parties have no evidence to prove the truth of their respective allegations respecting the amount of the sum. Under these circumstances, to which of the parties assertions should credit be given? Are the account books of the defendants, unsupported by other proof, admissible as evidence, or can the mortgage be redeemed on payment of the sum mentioned by the plaintiff as constituting the original debt, and to which of the parties should an oath be administered?

Case of a dispute between a debtor and creditor as to the amount of a debt on mortgage.

R. The defendants admit that the houses mortgaged to them are the ancestorial property of the plaintiff. The only dispute arises from a difference in the statement regarding the amount of the debt, on account of which they were mortgaged. The plaintiff admits a debt of four hundred and forty-six rupees, and denies the excess above that sum claimed by the defendants. They have no proof of the excess

* See Prin. Claims, &c. 22 and 23.

claimed by them. The assertion on oath of the plaintiff should be credited; for he denies the excess of the claim alleged by the defendants. An oath should be administered to him, and he should swear that he heard from his mother and relations that the houses were mortgaged in security of a debt not exceeding four hundred and forty-six rupees, and that he never heard the debt mentioned as exceeding that sum. The account books of the defendants, unsupported by proof, are not admissible as evidence.*

Private account books, not admissible evidence.

CASE X.

Q. After the death of the husband, if it cannot be proved with what intention he bestowed on his wife money and effects during his lifetime, is her assertion to be credited according to Law, or is the assertion of the husband's heirs entitled to a preference, in determining with what intention the deceased parted with his property?

R. If the assertions of the widow and the heirs should be at variance on this point, the heirs asserting that the husband had given to the widow certain property, and she denying the receipt of such property, in this case it is incumbent on the heirs to adduce witnesses; and, if they have no evidence, the denial of the widow on oath will be credited. Such also is the rule of proceeding if their assertions should be at variance with regard to the value of the property received: the heirs asserting that the widow had received property to a certain amount, and she stating it to have been of less value. If their assertions should be at variance on another point: the heirs stating that the husband had given her the

Case of a dispute between the widow and the other heirs as to her having received property from her husband.

And as to the value thereof.

And as to the terms on which it was received.

* See Prin. Claims, &c. 24. The plaintiff in this action may, in one point of view, be said to have been the defendant, as a larger claim was brought against him than he admitted to be just.

NOTE.—On Spl. App. Petition No. 91 of 1849, the Madras Sudder Udalut ruled on 20th August 1849, in a case between two Mahomedans, that a Merchant's accounts, if *satisfactorily* proved constitute in themselves documentary evidence sufficient to establish a claim to payment for goods delivered. Vide also Secs. XL. and XLIII. Act II. of 1855, relative to the admissibility of books of business.—ED.

property in satisfaction of her dower, and she alleging that she had received it as a gratuitous gift, it is incumbent on the widow to adduce witnesses, and if she have no evidence, the assertion on oath of the heirs will be credited. If their assertions should vary regarding the household property, the widow claiming the property as her own, and the heirs asserting that it belonged to the husband, and neither of the parties have witnesses to prove their respective allegations, such part of the property as is usually appropriated to female uses will be made over to the widow, on her corroborating her claim by oath, and such part as is usually appropriated to male uses will belong to the heirs on the same condition; and, with respect to property of a common nature, there exists some difference of legal opinion. According to the opinion of Aboo Haneefa, the property will belong to the survivor of the parties to whom it was alleged to have appertained, after oath being made by the survivor. In this case the survivor is the widow; and according to the opinion of Moohummud, it will belong to the heirs of the husband. According to the opinion of Aboo Yoosuf, such part of the property as might naturally have formed the peculiar property of the widow, with reference to her condition in life, should belong to her; and the remainder to the heirs of the husband, and the survivorship of either party can make no difference, as the deceased husband is represented by his heirs.*

And as to the right to household property.

CASE XI.

Q. A plaintiff claims the property of a person named *Bazeed Khan*, five and twenty or thirty years after his death; alleging that she is his daughter. The defendant in reply pleads that *Mussummaut Rai Bail*, the

* See Prin. Claims, &c. 24 to 30.

mother of the plaintiff, was the *hurum* (concubine) of her father, and the slave of *Burree Beebee* his wife, and that she was never married to *Bazeed Khan*. One witness adduced by the plaintiff states his *conjecture* that a marriage took place. Under these circumstances, is the claim of inheritance set up by the plaintiff established? And on which of the parties does the *onus* legally lie of proving or disproving the marriage, on the plaintiff who makes the claim, notwithstanding the admission of concubinage by the defendant? or will the Law presume the marriage of *Rai Bail*, until disproved by the defendant.

Rule in cases of denial.

R. The plaintiff, five and twenty or thirty years after the death of *Bazeed Khan*, has sued the defendant for the property left by that person, alleging that she possesses the right of inheritance as his daughter. The defendant, in answer, pleads that *Mussummaut Rai Bail*, the mother of the plaintiff, was the *hurum*, or concubine, of *Bazeed Khan*, and the slave of his wife *Burree Beebee*, and that she was never married to *Bazeed Khan*. This answer involves a denial of the plaintiff's having any right of inheritance as daughter, by reason of her mother's not having been married to *Bazeed Khan;* and it further contends that the plaintiff's mother was the slave of the wife of *Bazeed Khan*, and the concubine of that person. According to the Moohummudan Law, it is necessary, in all claims, that, after the defendant has denied the claim, the plaintiff should prove it; and it certainly is not incumbent on the defendant to prove the invalidity and insufficiency of the plaintiff's claim, which amply appears from his denial; except in a case where the defendant urges a plea to repel the claim of the plaintiff, on proof of which plea the original claim of the plaintiff falls to the ground, and which plea involves a partial admission of the

And in special pleas.

plaintiff's claim. In such case, it becomes requisite for the defendant to establish his plea. For instance, *Zeyd* sues *Omar* for a debt of one thousand rupees, and *Omar*, with a view to repel the claim, pleads repayment of the money borrowed. In this instance it is incumbent on *Omar* to prove the repayment, which, if he should fail to do, the claim of *Zeyd* to the sum in dispute will be established; because the plea of *Omar* involves an admission that the debt was originally incurred. It would have been otherwise had the plea of the defendant not involved a partial admission of the claim, and had expressed a total denial. For instance, *Zeyd* sues *Omar*, the son of *Khalid*, by his wife *Hinda*, for half the property left by *Khalid*, calling himself the half-brother of *Omar* and son of *Khalid* by another wife (*Zeinub*). *Omar* in answer pleads that *Zeinub*, "the mother of *Zeyd*, was always the wife of *Bukr*, and that she could not therefore be the wife of *Khalid*, nor could *Zeyd* be the son of *Khalid*. In this instance it is permitted to the defendant *Omar* to prove the marriage between *Zeinub* and *Bukr*. If he prove it, the claim falls to the ground; and if he do not prove it, still it will be incumbent on *Zeyd* to prove the marriage of his mother with *Khalid*, or the fact of his being the offspring of *Khalid*, in some other mode, before he can be entitled to a moiety of the inheritance. In the suit in question, the defendant denies the fact of the plaintiff's mother having been married to *Bazeed Khan*, and states her to have been the slave of the wife of *Bazeed Khan*, and concubine of that person. This answer therefore involves a total denial of the plaintiff's claim. The defendant, if he pleases, is at liberty to bring evidence to prove that the plaintiff's mother was the slave of the wife of *Bazeed Khan*, in the legal acceptation of the term, and should he prove it, her claim will fall to the ground; but should he fail to prove

Example.

Exception in cases of special pleas.

Example.

it, or decline doing so altogether, still it is incumbent on the plaintiff to prove her mother's marriage, or to establish, by some other mode, the fact of her being the offspring of *Bazeed Khan*, without which she is not entitled to the inheritance. The witness who states that he conjectures the mother of the plaintiff was married, admits that the ceremony did not take place in his presence, and that he never heard *Bazeed Khan* acknowledge the marriage; and he states further that his conjecture is founded on the fact of fornication having been strictly prohibited in the time of *Hafiz Ruhmut*, (the *Rohilla* Ruler;) whence he concludes that the intercourse between *Bazeed Khan* and the plaintiff's mother must have been matrimonial. Such conjectural evidence however is not admissible in Law; for it is necessary that a witness should possess firm belief. The defendant has admitted that the plaintiff's mother was the *hurum* of *Bazeed*, yet taken along with the context, the use of this expression cannot afford any argument in favor of the marriage. Although the term "*hurum*" does, according to some authorities, signify a married woman, yet, according to the popular acceptation, it is usually meant to denote slave girls and the like, who are taken under the protection of a man, and kept secluded, whether married or not. The term therefore as used by the defendant, (he having distinctly asserted that the plaintiff's mother was unmarried,) must be held to mean a concubine merely. Such expression, therefore, in conjunction with the conjectural evidence of one witness, cannot raise any presumption in favor of the marriage of the plaintiff's mother with *Bazeed Khan*.*

Of conjectural evidence.

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* The above opinion was delivered by *Moohummud Rashid* and *Hamid Oollah*, the two established Law officers attached to the Court, and judgment was given accordingly; but *Moulovee Amaun Oollah* (who was at that time officiating for *Surajoodeen* as *Kazeeool Koozat*) delivered an opinion, declaring that the marriage was established, and that the plaintiff was therefore entitled to the inheritance.

CASE XII.

Q. A person sues a woman for certain property, alleging that she is not the daughter of the person whom she pretends to be her father, and claiming the property as his right of inheritance. Judgment being given in favor of the defendant, he appeals from the decision, and the woman dying, *pendente lite,* he retracts his former plea, and states that she really was the daughter of the person whom she pretended to be her father, but that he has a right to succeed to her property as her lawful heir, in virtue of his relation to the person whom she styled her father. Admitting the truth of the last plea, is he entitled to take advantage of it, notwithstanding his denial thereof in a former stage of the proceedings?

R. It appears that the claimant, during the lifetime of the woman, to whose property he lays claim, denied her being the daughter of the person whom she called her father, and that now, after her death, he claims her property, through

Claim of inheritance founded on a relation of

The opinion is ingenious and erudite; but did not exactly bear upon the case. It does not therefore seem necessary to furnish an accurate translation of it. He admitted that to establish marriage, it was necessary that evidence should be given in favor of it, or that there should be the husband's declaration; and he also admitted that the fact could not be established by the mere conjectural evidence of one witness; but he contended that the defendant, by admitting that the plaintiff's mother was the *hurum* of *Bazeed Khan*, had made out her case. He quoted several works of great authority to prove that the term "*hurum*" signifies a married woman, living in a state of seclusion, but in this case (it should be observed) the object was not to ascertain the true intent and meaning of the term, but the meaning attached to it by the defendant. He further contended that continual cohabitation is *primâ facie* evidence of marriage; and that it is criminal, without proof, to suspect a *Moosulmaun* of so improbable an act as that of fornication; and that where there are two suppositions, it is right to select that which is the more probable. But the question (it should also be observed) in this case, was not, what degree of evidence is required to establish the fact of marriage, but what degree of evidence it was necessary for the plaintiff to bring forward in order to establish her claim, it being a general rule of Moohummudan Law that, on the defendant's denial, the plaintiff must adduce proof of the claim. Had the suit been brought forward to set aside an alleged marriage, the presumption must undoubtedly have been in favor of the marriage; and it would have been upheld by hearsay and circumstantial evidence, such as cohabitation, common repute, and the like. See Prin. Claims, &c. 21.

which the claimant had previously denied the existence.

the medium of that person to whom he denied that she had any relation. This is in reality a claim to property under pretence of the acknowledgment of a relation, and is not legally admissible, by reason of its oppugnancy; according to the *Foosool-i-oostoorooshee,*—"A person claimed maintenance from another, alleging that he was his brother; but the relation was denied by the person from whom the maintenance was claimed. Afterwards the claimant died, and the other came forward as heir to his property on the plea that the deceased was his brother. His claim cannot be admitted; for this is not legally an acknowledgment of relation, which requires freedom from oppugnancy: it is in fact a claim to property." Besides the claimant did not content himself, in this instance, with a simple denial of the relation claimed by the deceased; but ascribed her parentage to another person, and adduced evidence in support of his allegation, and such acknowledgment is binding against the acknowledging party, in so much that, had the father of the deceased ascribed to her any other parent, his acknowledgment of that fact would have been good against him, and he would thereby have been incapacitated from again claiming her as his daughter. In the Court below, the claimant pleaded that the deceased had asserted a person to be her father who was childless, and that she had acquired the property by usurpation: he cannot now be admitted to claim the property as her lawful heir.*

CASE XIII.

Q. A marriage between two persons is alleged to have taken place, to substantiate which the following

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* See Prin. Claims, &c. 22.

evidence is adduced. One man and one woman depose that they were present in the assembly at the time of the marriage ceremony. Another man and another woman depose that they heard the alleged husband acknowledge the marriage, and another man deposes to the fact of the alleged wife living with the alleged husband on terms of conjugal cohabitation. Is this evidence legally sufficient to establish the fact of the nuptials having been celebrated?

R. This evidence is not legally sufficient to establish the fact of the celebration of the marriage, because the several witnesses depose to different facts, and the requisite number do not combine in deposing to any particular circumstance in proof of it.* What constitutes evidence of marriage.

CASE XIV.

Q. If an appellant in a suit die while it is pending and almost ready for decision, should the cause be decided in the presence of his heirs; and if the right of the respondent be established, are the heirs of the appellant answerable for the satisfaction of the judgment, or is it requisite that the respondent institute an action *de novo* against them?

R. The cause should be decided in the presence of the appellant's heirs, who are his successors and legal An action commenced against a par-

* This question turned upon a dry point of evidence. The depositions of the witnesses would doubtless have been received as abundantly sufficient to establish the strongest presumption of marriage, so as to confer all the rights attendant on that state; but it was nevertheless not considered to afford sufficient proof of the insulated fact of the celebration of the nuptials, although taken altogether, it was enough to create the strongest probability (and sufficient for all legal purposes,) that marriage had taken place. The whole doctrine of marriages, as will be seen on reference to the principles and precedents on the subject contained in this work, favour the construction here laid down.

ty who dies before decision may be prosecuted against his heirs without any proceeding *de novo*.

representatives. If the right of the respondent be proved, and the cause of action be a specific thing, it should be delivered to him, or if it be a sum of money, it should be paid to him out of the appellant's estate. There is no necessity to institute an action *de novo* against the heirs of the appellant.

CASE XV.

Q. 1. If a woman, sitting behind a curtain, stretch forth her hand from beneath it, and sign a document, saying in the hearing of witnesses, that she had executed that document in favour of her husband, and the witnesses, when called on to prove the document, state that they attested it by desire of the woman, who was behind a curtain, whom they do not know by sight, and with the sound of whose voice even they are unacquainted, in this case, is the evidence of such witnesses legally sufficient to prove, that the woman who signed the document was in reality the wife of such person?

To prove the identity of a concealed woman it is requisite, that one of the witnesses to her signature should have seen her person.

R. 1. If any man among the witnesses saw the woman with his own eyes, and the rest were unanimously satisfied with his assurance that she was in reality the wife of such person, then their evidence will be sufficient to establish her identity, but the evidence of witnesses is not sufficient for this purpose, from the mere fact of hearing her voice, if no one of them had seen the woman.

Q. 2. Supposing that the woman who subscribed her name, while concealed behind the curtain, had been seen by only one female, and that the rest of the witnesses were satisfied by her account, of the identity of the woman, will their testimony in this case be sufficient?

R. 2. The fact cannot be proved by the evidence of witnesses who had not seen the concealed woman, and who satisfied themselves of her identity by relying on the statement of a female who had seen her; but had the witness who saw her been a male, the corroborative evidence of the rest would have sufficed.* And that that witness be a male.

* See Prin. Claims. &c. 9.

NOTE.—The following passage illustrative of the course of Procedure in Mahommedan Courts of Law is extracted from Baillie's Law of Sale Intro., p. lxi. "The parties appear in person before the Judge, and the plaintiff states his case verbally. It is necessary that he should indicate the subject of his demand in terms sufficiently clear and explicit to make it known, and also assign the grounds on which he rests his claim. If his statement be sufficient on these points, his suit is pronounced to be worthy of a hearing, and he is entitled to a direct answer from the defendant, in the affirmative or negative. If the defendant when called upon by the Judge deny the demand, the plaintiff is required to produce his evidence. If his answer be that he has none, he is then told that he is entitled to the oath of the defendant. If the defendant decline to answer *yea* or *nay* to the plaintiff's demand, his silence is taken for a denial, so as to entitle the plaintiff to produce his evidence. If the defendant acknowledge the demand, or refuse when called upon to swear that he is not liable, or if his liability be established by the plaintiff's evidence, judgment is given against him accordingly. It is an universal rule that no one can be required to prove a negative, and as the plaintiff is usually in the position of the person who affirms, and the defendant of one who denies, the *onus probandi* is generally on the former, and the presumption is in favor of the latter, whose word and oath are accordingly said to be preferred or entitled to the preference. It requires some skill, however, to distinguish who it is that maintains the negative in a suit, as reality, and not appearances, are to be considered. Thus when the trustee of a deposit, says, "I have returned it," his word and oath are entitled to preference, because, though he affirms the return, he denies his responsibility. It is, therefore, usual in treatises on the Moohummudan Law to mention under the different heads, the party whose assertion is entitled to credit in the event of disputes regarding matters of fact."—ED.

APPENDIX.

DIGEST

OF

PRINCIPLES OF DECISIONS.

ABSENTEE.

Vide DEATH.

ACTION.

1. So long as the wife of a banished Mahomedan remains his wife, and does not take measures to divorce herself, she is legally capable of maintaining an action for the recovery of debts due to her husband. 20th Dec. 1823. 2 Borr 639. S. A. Bom.
2. A Mahomedan filing a suit for the recovery of his share of an hereditary office, and dying shortly afterwards, the Court under the opinion of the Law Officers, allowed the suit to be carried on by his widow, having a son, a minor, then living. June 1819. 2 Borr. 33. S. A. Bom.
3. A suit founded on a claim of inheritance having been dismissed, it is not competent to the Courts to entertain another action by the same individual, on the same grounds, though the person sued and the amount claimed be different. 13th April 1824. 3 S. D. A. Ben. Rep. 335.
4. In an action of *assumpsit* by a Mahomedan plaintiff, the defendant, being a *British Subject,* is entitled to the benefit of the British Law. Circa. 1826. Sup. Ct. Cal. Cl. R. 1834. 20 Mor. 243.
5. A Mahomedan feme covert may sue or be sued alone. 1st Term 1843. 1 Fulton 143. Sup. Ct. Cal.
6. A husband may recover the person of his wife by Civil action. 5th May 1832. 5 S. D. A. Ben. Rep. 200.

NOTE.—This doctrine was pronounced on the ground that a wife has no right to separate herself from her husband unless by reason of a divorce. Morley.

7. Where a Mahomedan woman had obtained a decree against her husband for the recovery of her dower, but which decree had not been executed, nor the dower paid, and he brought an action against her to come and live with him against her will; it was held, that, according to the Mahomedan Law, it is not imperative for a wife to reside with her husband until her dower is paid. 9th May 1832. Sel. Rep. 103. S. A. Bom.

8. A contract made by a man with a first wife not to marry a second wife is not illegal, and an action may be sustained if damages can be proved. 16th May 1838. 1 Fulton 361. Sup. Ct. Cal.

9. A second marriage of a woman, during her first husband's life, and without having been divorced by him, is no bar to the recovery of her person by her first husband, on Civil action, notwithstanding her unwillingness to return to him. 20th April 1841. 7 S. D. A. Ben. Rep. 27.

10. An action brought by a husband against his wife for refusing to live with him, should be instituted in the Zillah where her house is, and not where the marriage took place. 17th June 1846. 1 S. D. A. Ben. Sum. Cases, Pt. ii. 78.

11. An action of damages will not lie in the Supreme Court against a Native Prince residing at Madras, with the concurrence of Government, as his own ambassador. Zeib un Nissa Begum *v.* The Navob Azim ud Dowlah. 18th Sept. 1810. 2 Str. 130.

12. Held, that a suit by a mortgagor, or his *locum tenens,* against a mortgagee in possession, should be brought for adjustment of accounts and re-possession, if the mortgage debt be satisfied, and not for mesne profits. 19th April 1848. S. D. A. Dec. Ben. 344.

13. A Mahomedan female sued as heiress to her husband, deceased, for recovery of a debt due on a bond executed in favor of her husband. It appearing that her husband left a brother and other heirs entitled to inherit, held, that the widow could not sue alone, and the suit was remanded to afford the other heirs an opportunity of joining in the action. 27th October 1852. Dec. Mad. S. A. 141.

14. Plaintiff sued to recover his wife who had borne him two children, and who having by reason of ill health returned for a time to her parents' house, had been bestowed by them upon another man in marriage, and she not only refused to return to the plaintiff, but the so-called second husband declined to give her up. The lower Court awarded to plaintiff his wife, or 50 Rs. damages in case she refused to return to him. Held by the Sudder Dewanny Adawlut, that the second marriage during

the lifetime of the plaintiff, without divorce, is a nullity, and that the action for the recovery of the wife's person, notwithstanding her unwillingness to return to the plaintiff, is legally tenable under certain precedents of the Court.

Held further, that the lower Court should have simply awarded to plaintiff possession of the person of his wife irrespective of her wishes. 25th March 1857. Dec. S. D. A. Ben. 465.

15. The plaintiff's wife having during his absence, married another man and become pregnant; he sued for recovery of the outlay on the occasion of his marriage. Held, that he could not sue for the recovery of the outlay in question, there being no breach of contract as to the fulfilment of the marriage. 8th March 1858. Dec. S. D. A. Ben. 389.

NOTE.—The decision was confined to the ground of action. Damages for loss of his wife's society not having been claimed, the Court abstained from determining whether a Mussulmaun is at liberty to sue on that account.

ADMINISTRATION.

1. Under Act XX. of 1841, Administration need not be taken out before action brought by a plaintiff suing as representative of a deceased Mahomedan. 13th Feb. 1844. Sup. Ct. Cal. 1 Fulton 409.

2. The Registrar of the Court cannot take out Letters of Administration to a deceased Mussulmaun whose laws of inheritance and succession are saved by the 21st Geo. III. c. 70, extending the jurisdiction of the Supreme Court to native inhabitants of Calcutta. In the goods of Bibee Hay. 3rd Term 1819. East's Notes Case 105.

3. In selecting an Administrator in Native Estates, the Court will usually prefer its own Registrar. In the goods of Moonshee Ali. 20th Nov. 1843. 1 Fulton 339. Sup. Ct. Cal.

4. If special citations be not served on the widow and all the next of kin, whenever they are within the jurisdiction, a grant of Administration to the Registrar is irregular. In the goods of Shaik Nathoo. 24th July 1844. 1 Fulton 483. Sup. Ct. Cal.

5. Probate of Wills was formerly granted to the Executors of Hindus and Mahomedans, conformably to the practice of the Mayor's Court, until the Stat. 21st Geo. III. arrived in India when it was refused. Hyde's Notes 22d October 1791. Morton 74. Sup. Ct. Cal.

6. Natives, representatives of a deceased Native, are not bound to take out Letters of Administration in order to be entitled to

sue in favor of the Estate, or to act as representatives of their intestate. 17th Feb. 1812. 2 Str. 153. Sup. Ct. Mad.

7. Nor will the Supreme Court, in any instance, cite or use any means towards compelling Natives to come in and prove wills or take out letters, or grant them to creditors, to the prejudice of the next of kin. Ib.

8. The Supreme Court will grant Probate of the will of a Mahomedan affecting the rights of heirs, without first enquiring whether it has, or has not in that respect received their assent. 19th January 1813. 2 Str. 180. Sup. Ct. Mad.

9. Letters of Administration will not be granted to a Native who is not an inhabitant of Madras. 2nd Term 1816. 2 Str. 328. Sup. Ct. Mad.

10. Now the Court will grant Probate or Letters of Administration in the case of a Hindu or Mahomedan, deceased, leaving property and effects within the limits of the jurisdiction of the Court. 22nd October 1832. Cl. R. 1834, 119. Mor. 75. Sup. Ct. Cal.

11. The Court has a statutory right to grant Probates and Administrations in Native Estates, where there is property within the local jurisdiction. The Court has the power of selecting the Administrator, and in most cases, the Registrar will be preferred, but need not apply in his official capacity. In Hindu and Mahomedan cases any party may be appointed by consent of his next of kin. 20th Nov. 1843. 1 Fulton 339. Sup. Ct. Cal.

12. The transfer of the property of a minor by an administratrix, *durante minoritate*, after the minor had attained his age, will be considered invalid if such transfer be to his prejudice. 17th Feb. 1812. 2 Str. 158.

13. Commission at the rate of five per cent. was allowed to a Native Executor of a Native testator. 22nd March 1815. 1 Fulton 126, Note. Sup. Ct. Mad.

14. Native Executors or Administrators of Native testators were held not to be entitled to commission. Nov. 1834. 1 Fulton 120, Note. Sup. Ct. Bom.

15. Dictum of Awdry J. A Native Executor to a European Estate would be entitled to commission; an European Executor to a Native Estate would not. Ib.

16. The Executor of a Hindu Testator was held not to be entitled to commission. 18th March 1837. 1 Fulton 113.

17. Native Executors generally attempt to charge a commission of five per cent. upon the assets collected ; but the Court thinking that the reason for giving commission to European Executors (who are very frequently mere strangers to the deceased) does not apply to Natives, have always resisted it. 26th July 1842. Perry's Notes, Case 4.

18. An agreement obtained by an Executor from the sole next of kin and heir at law, for commission, is not such a contract between two independent parties as the Court will sanction or enforce. Ib.

19. The son of a deceased Executor is not liable for claims against his father in capacity of Executor. 15th July 1847. S. D. A. Dec. Ben. 334.

20. The application of the son of a deceased Executor to the Court to draw some money, then in deposit, on account of the Estate, was rejected on the ground, distinctly set forth, of such son not being the Executor. Ib.

21. The Registrar of the Supreme Court, Plaintiff in a suit, as guardian of a minor (a Mahomedan female), was non suited, as not legally authorized to act in her behalf. 20th Sept. 1848. 7 S. D. A. Ben. Rep. 559.

NOTE.—The Registrar sued as Administrator to the Estate and guardian of the minor. Morley.

ADOPTION.

1. Adoption under the Mahomedan Law confers no right to succession to property. Case No. 12 of 1817. 1 Mad. Dec. 167.

2. A deed of adoption by a Mussulmaun, declaring that the adopted son should " succeed to his property and title," was held, on appeal, to be inoperative and void, either as a deed of gift, or as a testamentary disposition, no delivery of possession, and relinquishment by the donor, or seizin by the donee, having taken place. 5th Feb. 1844. 3 Moore's Ind. App. 245.

AGENT AND PRINCIPAL.

1. An engagement having been written without the knowledge and consent of a female on a signed blank, and entrusted by her to her Agents, for another purpose, was pronounced to be an invalid instrument. 30th October 1805. 1 S. D. A. Ben. Rep. 110.

NOTE.—The custom of entrusting Agents with signed blanks being very prevalent, the decision in this case is important. It was adjudged, that the Principal is not bound by an engagement, which his Agent has inserted in the blank without authority or against instructions. Macnaghten.

ALLOWANCE.

1. Gratuitous. It is not incumbent upon a person to continue to another a gratuitous allowance for life. He has a right to revoke it, because an allowance of this description is a gratuitous donation, which provided the donee be a stranger, the donor is at liberty to retract; according to this passage in the Hidayah, viz., "If a man makes a donation to a stranger, he is at liberty to revoke it, unless he has received a consideration for it." Case 24 of 1814. 1 Mad. Dec. 118.

2. An allowance granted by a Kararnamah, there being nothing in the said deed to show that it was meant to be hereditary, even if it be granted as a compensation for the relinquishment of a claim by the grantee, will cease at the death of the latter, there being no stipulation to the contrary; the continuance of such allowance to the widow of the grantee, and subsequently to an adopted son of the latter, is a voluntary act of the grantor, and does not establish any right in those persons, or either of them, to claim it. Case 12 of 1817. 1 Mad. Dec. 167.

ANCESTRAL ESTATE.

1. By the Mahomedan law, a gift of ancestral property, held as a joint and undivided estate, by one of the sharers is invalid, where no actual partition has taken place. 3rd May 1816. 2 S. D. A. Ben. Rep. 180.

2. An Istimrar grant, with reversion to the descendants of the grantee in perpetuity, *Batarik-i-dawam Nuslun-baad Nuslun*, is under the Mahomedan law, an heritable and transferable property; and there is nothing in the words *Nuslun baad Nuslun*, to exclude a widow from the right of inheritance. 13th August 1850. 5 Dec. N. W. P. 240.

NOTE.—This suit was between Hindus, and Morley remarks, the above "was the futwa of the law officer, and the Court observed that they did not fully subscribe to the opinion of the absolute alienable character of the grant, but the point was not then before them: in other respects they accepted."

3. The lands of Mahomedans and Hindus descend according to their respective laws. The Stat. 21st Geo. III. c. 70, expressly directs that every question of succession and inheritance is to be so determined. Chamb. Notes, 28th March 1785. Morton 72. Sup. Ct. Cal.

4. Estates of freehold and inheritance are recognized by British law in Bengal, and in the hands of all but Hindus and Mahomedans, they descend according to British law. Cl. Ad. R. 1829. 61 Sup. Ct. Cal.

5. Excepting in the case of Hindus and Mahomedans, there is no other law than the British, which can effect the descent of lands in Calcutta, all other classes of persons are liable to British law only. Ib.

6. Lands and houses in Calcutta have escheated to the Crown for want of heirs, and grants have been obtained through the Crown officers of England, of such lands in favor of illegitimate children. Ib.

7. A jageer under Reg. XII. of 1805, can be divided among the heirs, even the females of the original grantee, like any other part of his estate. 24th Nov. 1853. Dec. S. D. A. Ben. 932.

APOSTACY.

1. Apostacy from the Mahomedan faith if *subsequent* to the devolution of heritable property does not deprive the apostate of his right of succession. 30th Dec. 1808. 1 S. D. A. Ben. Rep. 268.

2. The petitioner originally a *Hindoo* but since a *Mussulmaun*, sued for the recovery of his wife and daughter on the ground that they had also embraced Mahomedanism. Afterwards he petitioned the Court of first instance (alleging that the relatives who were also made defendants) were about to give away his daughter in marriage, and prayed that security be required from them under Sec. IV. Regulation II. of 1806, to abstain from doing so. The Court directed security to be furnished accordingly. Against this order, the daughter appealed summarily to the Zillah Judge on the ground that she had reached puberty and wished to be married; whereupon the order for security was placed in abeyance. A special appeal having been subsequently admitted by the *Sudder Dewanny Adawlut* at Calcutta, to try the legality of the order of abeyance of security, as the acts of one or other of the Defendants would prevent the ultimate performance of the COURT'S JUDGMENT, Held, by a full bench, that, under the circumstances of the case, the Zillah Judge was wrong in directing the order of the Court of first instance for security to remain in abeyance, and he was enjoined to uphold it so far as to require security for the due execution of the final decree which might be passed in the suit. 13th March 1856. Case 33. Sevestre's S. D. A. Ben. Rep. IV. 77.

3. A sale of property having been disputed on the ground, that the seller, a Hindoo, had forfeited his rights, before the sale, by becoming a Mahomedan, held, that if there was any law or usage among the Hindoos which affected the right of Kalee-

persaud to dispose of his property by sale, by reason of his having become a Mussulmaun, such law or usage, cannot be acknowledged, or enforced in this Court, with reference to the provisions of Act XXI. of 1850, and that this law has a retrospective effect and reaches conversion which took place before as well as after its promulgation. 14th Dec. 1852. Dec. S. D. A. Ben. 1103.

4. Held that a Soonnee female does not necessarily become a Sheea, by marrying a man of that sect. 31st Dec. 1856. Dec. S. D. A. Ben. 1092.

5. Held by the majority of the Court (Colvin J. having declined to pronounce an opinion respecting the application of the Act to the case), that by Act XXI. of 1850, so much of any law as inflicts on any person forfeiture of rights or property, or may be held to impair or affect any right of inheritance by reason of his having been excluded from the communion of any religion, shall cease to be enforced as law. If we were to assume therefore, that Isuntoonissa had become a Sheea, and that by Mahomedan law a Soonnee could not inherit the property of a Sheea, it appears to us that this Act over-rides the older law, and that that law cannot now be enforced. The clear purport of Act XXI. of 1850, is, that religious exclusion shall not be permitted to check the ordinary current of the Civil law of inheritance, and that any law previously in force which should be taken to interrupt the law of inheritance, upon the ground of a change of religious faith, shall not at all be enforced. Ib.

NOTE.—This case is not very clearly reported. It does not appear that the Plaintiff changed his religion, and there was no proof that Isuntoonissa (through whom he claimed) changed her's. The decision therefore cannot be held to establish the fact that a Soonnee can inherit in accordance with the Sheea law of inheritance.

BASTARD.

1. It is in the discretion of the Supreme Courts to *give* or *refuse* to its mother the possession of an illegitimate infant; and in the exercise of this discretion the interest and benefit of the child will be principally regarded. 14th Sept. 1814. 2 Str. 271.

2. British Subject. A Native Christian, born of a Native Mussulmaun woman, and the illegitimate son of a British father, is not a British subject within the meaning of the term as used in the Charter and in the various Acts of Parliament. 21st June 1821. East's Notes, Case 26, Sup. Ct. Cal.

3. With respect to the right of inheritance of bastards by slave

girls and women who are not slaves, vide Tit. In. 10, 11, 12, 13, 14 and 15. For parentage or paternity, vide do.

4. The son of a Mahomedan by a slave girl, if acknowledged by his father is entitled to inherit. 17th Jan. 1848. S. D. A. Dec. Ben. 18.

5. An illegitimate son of a Mahomedan, who, during his lifetime, had held a share of an office which was *Watan* or hereditary, has no claim to such share on the decease of his father where the custom of the country does not allow bastards to succeed to hereditary offices; and although the Mahomedan law recognizes no *Watan* property, but classes all property under the term *Tarikat* or "effects," and by that law an illegitimate son would inherit and succeed to the office; yet under Sec. 14 of Reg. II. of 1800,* which directs the customary rule of the country to operate under certain circumstances to the exclusion of the written law, such claim cannot be admitted where the custom of the country differs from the law. 21st Feb. 1821. 2 Borr. 33. S. A. Bom.

6. A natural son of a Mahomedan woman, by a Christian, if brought up in the profession of the Christian religion, cannot of right inherit her property. In the goods of Bibee Hay, 3rd Term 1819. East's Notes, Case 113. Sup. Ct. Cal.

7. A guardian, appointed under the will of the putative father of an illegitimate child, has no claim to possession or custody of such child as against the mother. 14th Feb. 1850. 5 Dec. N. W. P. 39.

8. The mere fact of cohabitation by the mother of an illegitimate child, with the putative father, does not of itself constitute such a degree of immorality as would justify the Court in removing the child from her custody. Ib.

BENAMEE.

Vide Farzi.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. By the Mahomedan law every Bill of Exchange imports a command to the drawee to pay; and his acceptance is not only an admission of effects or money in his hands to pay, but also an undertaking by the acceptor, as well with respect to the drawer, as the payee to pay the bill. Case 5 of 1805. 1 Mad. Dec. 1. Lord William Bentinck, Chief Judge.

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* Rescinded by Reg. I. of 1827. Morley.

2. The drawer of a Bill of Exchange accepted by the drawee can only become responsible for payment thereof in one of two cases; viz., if he had entered into an agreement to pay, in the event of payment being refused by the acceptor; or, if the acceptor had died insolvent. Ib.

3. By the custom of Merchants, though the indorsee of a Bill of Exchange was dead at the time it was endorsed to him, his legal representatives are entitled to recover the amount. 8th July 1819. East's Notes, Case 101. Sup. Ct. Cal.

4. And the heirs of a Mussulmaun deceased may sue on a bill of exchange indorsed to him, though the deceased should have made a will appointing an Executor, or given verbal directions to others, to collect his debts, &c., and pay over the amount to his widow. Such Executor cannot sue in his own name, but an action may be brought by a creditor of the deceased. Ib.

BONDS.

1. A claimed from B a sum of money due on a bond executed to him by C, for which B was alleged to have made himself responsible. It appeared that there was no evidence to prove that B was justly responsible for the payment, for though B had agreed to discharge the demand, this promise was coupled with certain conditions, with which A refused to comply, and the nature of which would seem to show that B, so far from agreeing to pay the amount as a debt justly due by him, consented to pay it partly as a means of freeing himself from the importunities of A, and partly as the price of certain papers, which, in a moment of confidence, he had entrusted to A, and which he was apprehensive A would use, or had used to his prejudice. Held, therefore, that A has failed, under the circumstances, to substantiate his claim. Case 19 of 1814. 1 Mad. Dec. 107.

2. A claimed a sum of money due on a bond executed to him by B; but it appearing that no consideration had ever been given for the bond, which had been executed with a fraudulent intention, merely to make it appear before the Collector that A had become the creditor of B, for the purpose of undertaking the rent of a certain district which the *Zemindar* wished to resume, and that he had received at the time a counter document from A, which he produced; the Court, in deciding against the claim of A, animadverted upon the disgraceful grounds on

which B had resisted the claim. Case 20 of 1814. 1 Mad. Dec. 112.

NOTE.—The Judges further ruled that they could not permit a party to benefit by a transaction confessedly intended to impose upon the Government.

3. A lent a sum of money on bond to B, payable in two months, with 1 per cent. per mensem interest; and also two other sums of money on bonds to C, with the like interest, and the principal to be payable on demand. D became surety for the three bonds, and executed deeds accordingly. B and C failed to pay their bond debts, and D refused to fulfil his engagement of responsibility. It appeared, on evidence, that C had acted as the Goomastah of D, and that the latter had moreover, executed a *Kararnamah*, by which he became surety for the two bonds of C. It was held, that although according to the Mahomedan law, A could not recover under the security deeds, either originally or finally; yet, as the *Kararnamah* clearly showed that D looked upon himself responsible for the bonds of C, no question to the law officer was necessary regarding security; and D was accordingly decreed to pay the same, with interest from the date of the decree of the lower Court at the rate of 1 per cent. per mensem. Case 10 of 1818. 1 Mad. Dec. 207.

4. A bond having been executed by the wife (a Mahomedan) through means of her husband, and she having received the consideration, although she subsequently paid it over to her husband, held, that, under these circumstances, and irrespective of the subsequent payment of the consideration to the husband, the wife was clearly responsible for the sum due under the bond. Judgment accordingly against any property belonging to her found in possession of defendants, her heirs. 23rd April 1857. Dec. S. D. A. Ben. 661.

BRITISH SUBJECTS.

1. A Native Christian, born of a Native Mussulmaun woman, and the illegitimate son of a British father, is not a British Subject within the meaning of the term as used in the Charter and in the various Acts of Parliament. 21st June 1821. East's Notes, Case 26, Sup. Ct. Cal.

NOTE.—There can be no doubt that the illegitimate descendants of European fathers by Native mothers, are not British Subjects in the above sense; but as an erroneous opinion prevails respecting the legitimate descendants of British fathers, the following Extracts from a letter from Mr. Ritchie,

Advocate General, Calcutta, dated 22nd Dec. 1858, which is to be found in Sevestre's Reports, and was also circulated by the Madras Government in the early part of 1859, may not be out of place.

Para 2. "The son of a father who was a European British Subject, and the son of such son, are both British Subjects within the meaning of the Charter and Statutes, *whatever be the race and country of their mothers, provided the sons were born in wedlock.*"

5. "I am inclined to think in respect to all persons, descended *legitimately* from a male European British Subject, and born in British India subsequently to the vesting of the Sovereignty in the Crown, *there is no limit in point of degree of descent*, to the right of such persons to claim the privileges of British Subjects."

NOTE.—It further appears from the Bengal Constructions 978, 806, referred to by Mr. Baynes in a note to page 1 of the 1st Edition of his Treatise on the Madras Criminal Law, that, "the legitimate child of a British father, by a woman of the country is not amenable to the Mofussil Courts," in criminal matters.

CASTE.

1. A Hindu cohabiting with a Mahomedan woman was held to be subject to the penalty of irrevocable expulsion from his caste, and by such expulsion to lose his right to hereditary succession. 17th March 1814. 2 S. D. A. Ben. Rep. 108.

2. Rearing pigs and selling them is not sufficient to justify the expulsion of a Mahomedan from his caste. 17th June 1848. S. D. A. Dec. Ben. 541.

3. A Mehton or headman of a class of Mahomedan weavers, is not responsible for the default of his fellow weavers, in the payment of ground rent due from them, since, as neither the Government nor its Officers recognized him in the office, he is not vested with any authority to compel payment from his brethren, and it would therefore be manifestly unjust to hold him responsible for a default which it was not in his power either to prevent or make good. 30th May 1850. 5 Dec. N. W. P. 100.

4. Vide APOSTACY 1.

CHAMPERTY.

1. A deed of sale of property for a *specified* consideration, although with the avowed object of enabling the seller to prosecute a claim at law, was held not to be invalid on the ground of Champerty, to constitute which the consideration must be indefinite, and the stipulation, the transfer of a portion of the property sued for, on the transferee advancing money for the payment of costs. 13th May 1848. 7 S. D. A. Ben. Rep. 495. It was fur-

ther decided that the sale was not invalidated by the vendor not being in possession. Ib.

2. One of two plaintiffs having engaged to defray the expenses of a suit in consideration of a share of the property in litigation sold by the other to him, the plaintiffs were non-suited and ordered to pay all costs. 28th July 1846. S. D. A. Dec. Ben. 289.

3. The plaintiffs in a suit having sold a portion of the lands in dispute to raise funds for carrying on the suit, the transaction was held to come within the law of Champerty, and their suit was accordingly dismissed with costs. 11th August 1847. S. D. A. Dec. Ben. 423 and 6 S. D. A. Ben. Rep. 298.

4. The substitution *pendente lite* of a legal bond, for one rendered illegal by conditions of Champerty, and which had been cancelled, will render a suit available. 14th Sept. 1850. S. D. A. Dec. 483.

5. Vide Tit. Contract 6.

NOTE.—The Madras Sudder Adalut circulated with proceedings of the 22nd August 1842, the following *Futwa* of their Mahomedan Law Officers on the subject of Champerty.

"If a person assists a party with money or otherwise, to prosecute a groundless Civil action such an act will not be justifiable and he will be liable to Tazeer.

"If on the other hand a person assists a plaintiff or defendant with money or otherwise to prosecute or defend his just case, he will be entitled only to recover the amount actually advanced by him, but not to share in the benefit of the award."

NOTE.—Mr. Latour at page 146 of his Judicial Maxims, quotes some sensible remarks from the Jurist of the 2nd May 1857, p. 171, on the subject of Champerty. The writer recommends that parties may reasonably be left to make their own arrangements for raising money or carrying on their suits; and he sees no objection against allowing effect to the agreement, if the "campi partitio appears to them a better mode of remuneration than a gross sum of money."

COMPOSITION FOR MURDER.

1. Composition for murder is allowed by the Mahomedan law and the agreement for it becomes a binding contract. 4 Hed. 99. 10th April 1794. 1. S. D. A. Ben. Rep. 4. Sir John Shore and Council.

Query. Would such a contract be upheld in the present day ?

COMPROMISE.

1. A sued B for the moiety of an estate held jointly, and B, in answer, asserted his right to the whole. A's suit was withdrawn on a compromise, by the terms of which, A assured to B the reversion of the moiety, held by him, and generally, of his entire estate real and personal. In a subsequent action brought against B, by A's heirs, it was held, that the claim as to the moiety of the estate specified, was repelled by the compromise. 19th Sept. 1831. 5 S. D. A. Rep. 143.

CONTRACT.

1. An engagement by A, the widow of a deceased Mahomedan, to B, his son, stating that B shall sue for her share of an estate then under litigation, and that the same shall become the property of B, B supporting A for life, is not, in Mahomedan law, valid as a conveyance of property. 9th August 1799. 1 S. D. A. Rep. 25.

2. By the Mahomedan law in a commutation of money for money, the delivery must be immediate. 28th Dec. 1841. 7 S. D. A, Rep. 62. Vide Macnaghten's Principles, p. 43, para. 12.

3. It is essential to the validity of a contract of exchange, that the subject of it, and the consideration, be distinctly specified. Ib.

4. When a suit was brought to recover a sum of money alleged to be due to the son of the late incumbent of the office of Mufti at Surat, upon a parol engagement with his successor, to support him and his mother, he not being fit to succeed to the office, the Ameen and the Assistant Judge (Grant) decreed in the Plaintiff's favor; but their decrees were reversed on appeal, the Court considering, that as the agreement had been made apparently subsequent to the appellant's appointment it was revocable, the arrangement being of a private, and not of a binding nature, after it had ceased to be voluntary on the part of the appellant. 8th May 1832. Sel. Rep. 97. S. D. A. Bom.

5. A contracted to supply B with a certain quantity of saltpetre on a certain day, and in the event of B not taking it on that day, he was to pay interest on the price till he should receive it. It was not taken on the day fixed, and A, a day or two afterwards, sold it to a third party. This was held to be a breach of contract by A, and he was adjudged to pay damages. 19th July 1847. S. D. A. Dec. Ben. 345.

6. A deed of sale of property for a *specified* consideration, although with the avowed object of enabling the seller to prosecute a claim at law, was held not to be invalid on the ground of Champerty, to constitute which the consideration must be indefinite, and the stipulation, the transfer of a portion of the property sued for, on the transferee advancing money for the payment of costs. 13th May 1848. 7 S. D. A. Ben. Rep. 495.

COURT OF WARDS.

1. A female succeeded to a share of a joint estate, managed by the Court of Wards both before and after her succession. She alienated her share to B, and repelled his action by pleading her incompetency to alienate without leave of the Court of Wards. The plea was disallowed, *because no enquiry* according to Reg. X. of 1793, (Ben. Code) *had been made by the Revenue Authorities as to her qualification or disqualification.* 4th Dec. 1832. 5 S. D. A. Ben. Rep. 240.

2. Semble. That the alienation by any female ward, whom the Governor General under Sec. 2 of Reg. X. of 1793, *after report might not declare competent, is invalid.* Ib.

CUSTOM.

1. Where a prescriptive usage is proved, or acknowledged to exist in any locality, such usage of itself is law, binding on all classes to whom the usage has been prescriptively held applicable. It is unimportant whether the usage has given local force, to rules of Mahomedan or of Hindoo, or of any other law. *Whatever* has been so established by usage has become law within the local limits. It is on this principle that the rules of the Mahomedan law of pre-emption have been held to be in force. 8th May 1851. Dec. S. D. A. Ben. 322.

NOTE.—Vide 44, Tit. Pre. and Note thereon.

DAMAGES.

1. Held that a Civil suit for damages is the only means by which a Kazi under Reg. III. of 1808 (Madras Code) can exclude others from performing the duties of that office. Camp. Reg. 189, Note (Fouj. Ad.) Madras Cir. Or. S. A. 5th Jan. 1841, No. 75. B. Vide Dues and Kazi.

DATE.

Vide TIT. DEED 8.

DEATH.

1. According to the Mahomedan law, the death of a missing person may be pronounced when ninety years from his birth may have elapsed, after which his estate may be divided among his heirs. 15th April 1831. 5 S. D. A. Rep. 108,—1820. 2 Borr. 20. Bombay S. A.

2. The son and daughter of an absent Mahomedan (declared to be forty years old when he left, and to have been missing thirty-five years), sued for the recovery of one-half of the family estate from the widow and son of his brother. The law officers declared ninety years from the time of birth to be allowed to a person in possession of an absentee's estate, but that another administrator of the estate should be appointed if it were mismanaged by the person in possession. The Court held, that under the circumstances the estate appeared to have been mismanaged, and ordered the heirs of the absentee to be put into possession of his share. 1820. 2 Borr. 20. Bom. S. A.

3. After sixty-five years' disappearance of a person the Courts must presume his death, unless proof to the contrary be adduced. 2nd July 1856. Doorjaim Beebee Petr. Case 98. Sev. S. D. A. Ben. Rep. IV. 2[illegible].

NOTE I.—When one of the heirs is missing, that is to say, when he is absent, and there is no certain intelligence whether he be alive or not, he is considered as living with respect to his own estate, and as defunct with respect to the estate of others.

"Thus, if he had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, (Sec. 82), but must remain in trust until that time when it will devolve on those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside; but such share is not reserved in trust for him and his heirs, but delivered to the other heirs, who would have taken it, if he had been dead; if he returns after this, he will be entitled to his share; but if he does not return, it devolves on the heirs, who came into possession at the former distribution, but not to the heirs of the missing person." Sirajiayyah. Hedaya. Vol. II. p. 293. Princ. Mah. Law, pp. 92—116—Baillie Inh. p. 166. Elberling Latour's Judicial Maxims, p. 354.

NOTE II.—Baillie at page 166 of his Treatise on Inheritance suggests in consideration of the great variety of opinions* relative to the period at which the death of a missing person may be presumed, that in all probability in such a case the Judges might perhaps consider themselves at liberty to exercise their own discretion, a latitude which some of the followers of Aboo Haneefa appear to have advocated.

* Aboo Haneefa allowed 120 years from birth; Mahomed 110; Aboo Yoosuf 105; but the generally received rule is according to the Hedaya 90 years. Baillie.

DEBTS.

1. By the Mahomedan law, the heir of a deceased Mussulmaun is liable to pay the debts of the deceased to the extent of the assets to which he may have succeeded; but he is not bound to pay the whole of his debts. 17th June 1840. 1 Sev. Cases 57. S. D. A. Cal.

2. Debts which must be satisfied before legacies and claims of inheritance, lie only against the estate of the deceased debtor. Ib.

3. A debt is contracted by B, the mother of A. A enters into a written agreement to discharge it out of a pension granted to him by the Honorable Company, which pension he mortgages as security. He dies without paying the debt, or any part of it, and before it or any part of it becomes due. The pension is continued by the Company to C, D and E, the sons and widow of A; it did not appear that C, D and E inherited any property either from A or B. The Court considered the question to be such, as, by Sec. 16. of Reg. III. of 1802 does not require a reference to their law officers, but such as common equity might determine without infringing any particular law; and it was held, that, as the Honorable Company granted the pension first to A, and afterwards to his widow and sons, it may have been chiefly his property during his life, but certainly was exclusively their's after his death: at his death, the property out of which the debt was to be paid ceased to form any part of his estate. C, D, and E were also held not to be responsible, out of property acquired by themselves for a debt which they neither contracted nor engaged to pay; and, moreover, that the pension alone having been mortgaged for the debt, no other property of A possessed by him or inherited from him by C, D, and E, could have been responsible for it during his life or after his death. Case 4 of 1821. 1 Mad. Dec. 280.

4. When the widow of a Mussulmaun had not derived any property from her late husband, she was held not to be liable for his debts. 6th June 1826. 4 S. D. A. Ben. Rep. 161.

5. Heirs are answerable for the debts of their ancestors to the extent of the estate they inherit. After liquidation of such debts, the personal judgment creditors of the heirs are entitled to satisfaction of their claims from the residue, as well as from the acquired property of the heirs. Shaik Kasim Aly. Petr. 5th July 1851. Case 34. Sev. Rep. S. D. A. Ben. III. 141.

6. Vide Tit. Inh. 89. Wherein the duties and liabilities of heirs as respects debts are considered.

DEED.

1. When a Mahomedan granted property by deed to the widow of his late father, who sold it to a third person, the sale was held to be valid (although the deed was not in the regular form of a *Hibeh nameh*), as it contained the words *dadeh shud*, it was given (by me.) 9th Jan. 1822. 2 Borr. 179. S. A. Bom.

2. A deed of gift, for a consideration bona fide, executed by a trader to his wife, such trader not being shown to be in debt at the time, or that he executed it in contemplation of insolvency, is good against subsequent dispositions of the property. Such a deed will, by the Mahomedan law, be construed according to the rules affecting the laws of sale; and the validity of a sale is derived, not from the seizin but from the contract. 1st Term 1843. 1 Fulton 152. Sup. Ct Cal.

3. Semble, a deed termed a deed of Bay-bil-wafa, executed on land for a sum of money, in favor of a person, through whom, not from whom, the money was borrowed, is not valid in Mahomedan law. 7th May 1804. 1 S. D. A. Ben. Rep. 78.

NOTE.—On the subject of sale, with the option of rescission within a limited time, or Bay-bil-wafa, considered as a mortgage, which some deem lawful and others not, See 2 Hed. 381. Morley.

4. Deeds of release, founded on an invalid deed of assignment were held not to be binding. 13th Feb. 1827. 4 S. D. A. Ben. Rep. 210.

5. A deed containing a provision contrary to an express ordinance of the Mahomedan law is void and ineffectual under such law. 28th Jan. 1833. 5 S. D. A. Ben. Rep. 262.

6. A Razeenamah and admission of the Plaintiff's claim, executed by her aunt, turning on the deed of her grandfather which had been declared to be invalid, was held to be inoperative. Ib.

7. A, a Musulmaun, by a deed assigned to his wife B, in satisfaction of her dower, whatever Zamindari properties and personal effects he owned and held, Held, that the quantity of the consideration being undefined and unknown, the deed was inoperative and illegal, so that the dotal obligation remained in force against the husband. 9th May 1833. 5 S. D. A. Ben. Rep. 304.

NOTE.—Vide 3. Hed. 293. Macn.'s. Prin. 50, para. 6—199. Case 3.

8. When the date of a certain instrument appeared stated according to the Samvat era, as far as regarded the day of the month, whilst the year mentioned was the Fusli year, and consequently the English date of the sale of the stamped paper being then ostensibly a day *posterior* to the engrossment of the instrument, it would be rendered invalid. The Court, seeing reason to presume that the person who engrossed the document intended to insert the Samvat instead of the Fusli year, and having found that such an alteration would render the dates of the instrument correct; and moreover the evidence of its execution appearing to be satisfactory, declared such instrument to be valid. 14th July 1835. 6 S. D. A. Ben. Rep. 32.

NOTE.—This case was between Hindus, but has been inserted to show how mistakes may occur in dates, when the Hindu and Mahomedan reckoning of time are both referred to.

9. A sued B to recover certain lands which he alleged B had relinquished by deed in his favor, in lieu of a monthly stipend of 50 Rs. B repelled the action as an attempt to defraud her of her property. The Zillah Judge dismissed the claim on defect of proof. A appealed to the Sudr Dewanny Adawlut, which affirmed this decision, because B had not been made a party in writing to the deed of relinquishment, the omission of which had rendered it inoperative and void. 28th Jan. 1842, 1 Sev. Cases 133. S. D. A. Ben.

10. A Kabin nameh, or deed of marriage settlement, by a Mahomedan to his junior wife, for a moiety of his estate was held to be invalid, it appearing that he had previously settled his entire estate on his senior wife, in lieu of dower, and that the deed in question had been executed without her permission duly obtained. 3rd May 1816. 2 S. D. A. Ben. Rep. 180.

11. But if the senior wife had executed an Ikrarnamah in favor of the junior wife, thereby granting permission to their husband to make over a moiety of the property in lieu of dower to the junior wife, and he had accordingly settled such moiety on her, such act would have been legal and valid, it resembling the act of an agent confirmed by his constituent. Ib.

12. A deed executed by the mother of a minor, on his behalf, but whilst his father was living, was held not to be binding, on the minor. 19th Aug. 1846. 1 Dec. N. W. P. 112. 9th July 1835. S. A. Mad. Pro. Civ. Vade Mecum, p. 97. In this case the father was not alive, and the mother appears to have been guardian.

DIVORCE.

1. By the Mahomedan law, *divorce is not demandable as a right*, by the wife, on payment of a consideration. 5th May 1832. 5 S. D. A. Ben. Rep. 200.

NOTE.—A wife has no right to separate herself from her husband, unless by reason of a divorce. But she is at liberty *with her husband's consent* to purchase from him her freedom from the bonds of matrimony. Morley.

2. Held in the case of a Mahomedan mother, who had been divorced from her husband, and who was not shown to be of bad character, that her claim to the guardianship of their daughter up to the age of 9 years, was superior to that of the father. 30th Jan. 1849. Morris' Sel. Dec. S. A. Bom. Part II. 29.

DOWER.

1. A kabin nameh, or deed of marriage settlement, containing a gift by the husband to his wife of the whole property possessed by him, or which might thereafter come into his possession, is valid, under the Mahomedan law, in regard to the property in the actual possession of the husband, but not in regard to that which is non existent. 30th June 1835. 6 S. D. A. Ben. Rep. 30.

NOTE.—The deed in this case was looked upon as simply a deed of gift, and justly so: the decision proceeded therefore, on the ground that, by the Mahomedan law, property non existent cannot be made the subject of gift whether in lieu of dower or otherwise. Morley.

2. A kabin nameh is invalid in respect to property not in possession of the husband at the time of the execution of the deed. 10th March 1843. 7 S. D. A. Ben. Rep. 123.

3. It was held that a kabin nameh was invalid if the property conveyed by it be not specified. 17th April 1844. 7 S. D. A. Ben. Rep. 158.

4. Where A claimed half of his late father's estate, but it appeared that the deceased had settled a dower of 300,000 gold mohurs on the mother of another son, B, which at her death (before her husband) was demandable by her heirs; it was held that the husband, one of those heirs takes ten annas of her property (i. e. of the dower due), and B, her son, six annas: these six annas therefore, of the dower, were now demandable by B from the paternal estate; and claims of dower must be satisfied before partition of heritage. A's claim of inheritance, in consequence will not avail. 20th July 1801. 1 S. D. A. Ben, Rep 48.

NOTE.—It would appear that the estate was insufficient to cover B's claim.

5. The widow of a Mahomedan declared his landed estate to have been given by him in his lifetime to a grandson, in whose favor she fabricated a deed of gift, as from her husband, which deed was set aside in a suit brought by one of the other heirs against the grandson. Afterwards at the suit of the widow for the lands in satisfaction of dower, as being the estate left by her husband, which the Defendant admitted they were, and pleaded that the widow had remitted her dower; the Law Officers declared the claim barred by estoppel, because the widow, by her allegation of the gift, had virtually declared that the lands were not the estate left by her husband, and could not now claim as being so. The Sudder Dewanny Adawlut doubted the application of the doctrine to the case; but on the presumption arising from the widow's declaration of the gift, that she must have remitted her claim of dower, dismissed the suit. 6th June 1803. 1 S. D. A. Ben. Rep. 64.

6. A written acknowledgment of the husband to one of his wife's heirs, after her death, was held to be sufficient proof of the amount settled upon her as dower. 24th August 1804. 1 S. D. A. Ben. Rep. 83.

NOTE.—Dower is due on the consummation of marriage, unless deferred by the terms of the settlement to a future period; and after the death of the parties the heirs of the wife are entitled to take the dower out of the husband's estate, deducting the husband's portion as one of the wife's heirs, if she die before him. 1 Hed. 123. Morley. (The references to Macnaghten which follow are not applicable.)

The widow's heirs may claim her dower at any time. Macn. Prin. 287. And the dower of a deceased woman is even claimable by her grandchildren, notwithstanding any lapse of time.* Ib. 365. Morley.

7. Judgment was given for the daughter of a deceased Mahomedan against the male relatives in possession of his estate for a half share of the dower of her mother, unpaid during life of the mother, whom the father survived, such dower being in law the mother's estate, recoverable by her heirs from the property of her husband. Ib.

8. Where the heirs of a Mussulmaun deceased claimed a share of his estate against his widow, who took the whole estate in satisfaction of dower, the principal ground of the claim, viz., that the amount of the dower, which absorbed the whole estate was excessive and therefore illegal, was rejected by the Sudder Dewanny Adawlut, as, by the Mahomedan law, excessive dower,

* This is correct under the Mahomedan law, but not under the law of limitation as prescribed in the British Regulations. Vide Macnaghten's Note at page 287. Also Case 22, below.

however improper, is not illegal, and judgment was accordingly given dismissing the claim. 30th Dec. 1808. 1 S. D. A. Ben. Rep. 266.

9. The dower due to a widow, on her husband's death, is payable from his estate, in preference to all claims of inheritance. Ib.

10. Landed or other immoveable property left by the husband cannot be taken by the widow in satisfaction of her claim of dower, without consent of the heirs or competent judicial authority. Ib.

11. Moveable property however may be taken by her, as far as the heirs are concerned, (but not to the prejudice of other creditors), in payment of dower indisputably due. Ib.

12. One of the heirs of the husband, having for several years acted as manager for his widow who had taken possession of her husband's landed estate in satisfaction of her dower, while none of the other heirs perferred any claim to the estate, may be considered sufficient evidence of consent, on the part of the heirs, of the widow's right. Ib.

13. Where a Mahomedan shortly before his death, made over a share of a Talook to his widow, in satisfaction of dower settled on her at marriage, and she held it till her decease (thirty-three years), without her title being disputed by any of the heirs of her late husband ; it was held that her heirs were entitled to inherit such share, as having belonged to her. 22nd July 1808. 1 S. D. A. Ben. Rep. 243.

14. By the Suniy doctrine, according to Aboo Haneefa, the extent of dower is not limited : the parties may extend it by agreement to whatever amount they please. 19th May 1809. 1 S. D. A. Ben. Rep. 276.

NOTE.—In this case the Law Officers rightly stated that, according to the doctrine of Aboo Haneefa, ten dirhems is the smallest dower. 1 Hed. 122. Macn. Prin. 59, para 20—276, Case XXV ; and they added that "amongst the Sheahs the lowest and highest rate is not fixed ; any thing possessing a legal value may lawfully be given as dower ; but the proper dower is 500 dirhems ; a greater sum is not illegal, although, according to some of the lawyers of that sect, it is improper." Morley.

15. In a suit by the heir of the son of A against the widow of A for a share of his estate, as joint heir with the widow, to which the widow pleaded that the whole estate, fell to her in payment of dower ; there being proof that she had received, in part of her dower, the property possessed by the husband at his marriage, and that she afterwards remitted her claim to the residue, it was held, that, under such circumstances the pro-

perty acquired by A after marriage was his estate, hereditable by his heirs; and judgment was accordingly given for the claimant's obtaining the share due to him as an heir of the son of the deceased. 7th August 1809. 1 S. D. A. Ben. Rep. 284.

16. Where a claim had been preferred against the widow of a Mussulmaun, by his sister, for half the property left by him, which was finally adjudged to be her right, in lieu of dower, and twenty-one years after that decision the same Plaintiff brought an action against the same Defendant for half of the same property, on the plea, that, even supposing the dower to have amounted to the sum claimed, she had realized the full amount from the profits of the estate; it was held that the claim was inadmissible. 9th Feb. 1820. 3 S. D. A. Ben. Rep. 12.

17. The heirs of a Mussulmaun recovered their shares in his estate, against his widow who had taken the same. The widow pleaded a set off for dower debt equal to the value of the entire estate; but the Court were of opinion that the claim of dower was distinct and unconnected with the case under consideration and should be brought forward in another suit. 11th Dec. 1820. 3 S. D. A. Ben. Rep. 59.

18. A instituted an action to recover from B (the widow of a Mussulmaun) her share of the deceased's estate, which she claimed by right of inheritance. B repelled the claim by a plea of dower due to her under a settlement which had exhausted the assets. The deed of settlement, however, appearing suspicious, it was held that the counter claim of B for dower could not be satisfied, and judgment was passed accordingly, with costs, in favor of A, without prejudice to the right of B to establish her claim as dower creditor. 15th March 1831. 5 S. D. A. Rep. Ben. 98.

19. Where marriage presents were sent and delivered by a Mahomedan to his wife, with due notice at the time that they were sent in lieu and satisfaction of dower, the formal acknowledgment to that effect, by the wife or her friends, was not held to be necessary. But where there was a want of proof on the husband's part of the delivery of the marriage presents, the Court held that the wife was entitled to obtain from him possession of her dower. 23rd May 1822. 2 Borr. 258. S. A. Bom.

20. A Mahomedan may alienate land to his wife in compensation for her dower, and the heirs have no claim upon it; for this reason, that dower is a debt, and debts must be first liquidated out of an estate. 19th June 1822. 2 Borr. 520. S. A. Bom.

21. In a disputed claim for land by Mahomedans, one party claiming under a deed of gift passed by the original possessor, and the other on the plea that the first owner had alienated it to his wife, in lieu of dower, he being the heir of such wife ; the Court decided, that as the deed was evidently a forgery, and as, though the alienation was not proved, it was probable from the subsequent possession of the property in that line, that the party claiming under the alienation to his ancestor was entitled to the property. Ib.

22. Where the heirs of a widow claimed her dower from her late husband's estate, under a deed executed by him before the Company's accession to the *Diwani*; it was held that such claim was inadmissible, the truth of the demand not having been acknowledged within 12 years prior to the institution of the suit. 6th Jan. 1824. 3 S. D. A. Ben. Rep. 292.

NOTE.—Vide Case 7. Morley observes, "In that case judgment was given for the daughter of a deceased Mahomedan against the male relatives in possession of his estate, for a half share of the dower of her mother, unpaid during the life of the mother, whom the father survived. But it appeared in evidence that the father, subsequently to his wife's death, and not twelve years before the institution of the suit, had acknowledged the debt of dower to be due. There does not appear to have been any case yet decided in which prescription from length of time has been held sufficient to bar the claim of a wife to her dower: should such case occur, the *reverentia maritalis* might possibly be considered to operate in her favor, agreeably to the doctrine of the Scotch law. See Erskine's Principles, 369. But with respect to the heirs of widows, or even, perhaps, to the case of widows themselves, who may have suffered a long period to elapse after the death of their husbands, the rules of limitation may be strictly applicable.—Macn. The Mahomedan law, however, exempts claims for dower, by the widow or her heirs, from any limitation as to time; and Sir W. Macnaghten's reservation in the above note, though perhaps politic and just, is at variance with the principles of the Mahomedan law."

NOTE.—Vide on the subject of limitation Case 36 and the note thereon. The decision of the Court settles the doubts respecting the application of the rule.

23. Where a claim was made to certain lands in satisfaction of dower, there being no other assets, the Court awarded possession of them to the widow, if they did not exceed in value her proper dower, or such as would be proportionate to the rank and circumstances of her family, although no deed of dower might be forthcoming. 25th March 1824. 3 S. D. A. Ben. Rep. 321.

24. A verbal contract for dower is valid by the Mahomedan law, even by a minor, who is an adolescent: the use of deeds is

only for a securer record. 13th Dec. 1830. 5 S. D. A. Ben. Rep. 75.

NOTE.—It was presumed from the evidence in this case, that the marriage had been consummated, notwithstanding the youth of the parties; otherwise half dower only would have been claimable. The opinion of the law officer as to the adolescent's power and liability was given without reservation; but it may be remarked, that, in this case, the uncle and tutors of the minor were present at the time of making the contract,—a verbal one, and assented thereto. Morley.

25. It is not imperative upon a woman to live with her husband until the amount of her dower has been paid; and when a Mahomedan woman had obtained a decree against her husband for recovery of her dower, but which decree had not been executed, nor the dower paid, and he brought an action to come and reside with him, he was nonsuited and made liable for all costs. 9th May 1832. Sel. Rep. 103. S. A. Bom. Vide 1 Hed. 150.

26. In an action brought by the widow of a Mussulmaun against his heirs for dower, they having ousted her from possession of his estate, which she had taken in satisfaction thereof; it was held that she was entitled to the amount claimed, though she had not sued till twenty years after the death of her husband. 24th March 1834. 5 S. D. A. Ben. Rep. 105.

NOTE.—There is no limitation in regard to a claim for dower by a widow or her heirs. Morley. But see cases 22 and 36.

27. Held that the widow of a deceased Mussulmaun cannot take possession of his real estate, in lieu of dower, without the consent of his heirs or a judicial decree. 7th June 1841. 7 S. D. A. Ben. Rep. 34.

NOTE.—But had there been no dispute as to the dower, and no doubt that the amount entirely absorbed the estate, the law would have sanctioned a different decision. Macn. Prin. 275. Morley.

28. A Kabinnameh, or deed of marriage settlement, by a Mahomedan to his junior wife, for a moiety of his estate, was held to be invalid, it appearing that he had previously settled his entire estate on his senior wife, in lieu of dower, and that the deed in question had been executed without her permission duly obtained. 3rd May 1816. 2 S. D. A. Ben. Rep. 180.

29. But if the senior wife had executed an Ikrarnameh in favor of the junior wife, thereby granting permission to their husband, to make over a moiety of the property, in lieu of dower to the junior wife, and he had accordingly settled such moiety on

her, such act would have been legal and valid, it resembling the act of an agent confirmed by his constituent. Ib.

30. Where a Mussulmaun settled certain property on his first wife in lieu of dower, but without specification in the dower deed, which merely stated "the whole of his property," and on her death married a second wife, to whom he executed a deed of Bay Mokasa, or barter of a portion of the same property in lieu of the dower settled upon her; it was held, that as the property had been separated from the husband's estate, and transferred to the possession of the first wife before the second marriage took place, the Bay Mokasa was invalid; but that it would have been valid, and the second wife entitled to the portion of the estate mentioned therein had no such separation taken place up to the period of the second marriage. 18th July 1837. 6 S. D. A. Rep. Ben. 178.

31. Where, in a marriage of two minors, the legal guardian of the husband not having been present at the marriage, and not having given his consent to the dower, and the husband on coming of age had not confirmed his acknowledgment of the dower; it was held that the dower was not demandable from the husband. 8th March 1817. 2 S. D. A. Rep. Ben. 233.

32. Unless the contrary be specified, dower must be considered as immediately demandable, and, till paid, cohabitation cannot be enforced. 13th Dec. 1830. 5 S. D. A. Rep. Ben. 76.

33. Semble, before the consummation of a marriage half dower is only demandable from the husband. Ib.

34. But where the appellant admitted that the respondent was his wife, and that he had been in the habit of frequenting her residence, it was thought to be conclusive, and to render any enquiry unnecessary as to the fact of consummation. Ib.

35. A girl, betrothed by her father during her minority, cannot set aside such betrothal on coming of age. It is competent, however, to the woman to refuse to leave her parents without payment of the Mahr Maujjil, or exigible dower, settled upon her at the time of her betrothal. 24th June 1840. 6 S. D. A. Rep. Ben. 293.

NOTE.—Vide Case 18 Tit. Marriage.

NOTE.—On the subject of mahr maujjil and mahr muwajjil, that is, dower exigible, and not exigible, sometimes also called prompt and deferred, respecting which there is much difference of opinion among the doctors, See 1 Hed. 150, 151. Macn. Prin. 59, par. 22, 278, Case XXIX. and Note. Morley.

36. Exigible dower, not demanded during the period limited by the regulations for the cognizance of actions, cannot be subsequently recovered. 21st Aug. 1805. 1 S. D. A. Ben. Rep. 103. 26th June 1841. 7 S. D. A. Ben. Rep. 40.

NOTE.—In this case the widow was held to be entitled to two-thirds of the dower claimed, one-third only being the *maujjil*, (or payable on her marriage), the recovery of which was barred by the rule of limitation, and the remaining two-thirds being *muwajjil* (not exigible during the continuance of marriage), and payable on the death of her husband, which happened only six years before the action. Morley.

37. Dower not exigible (*Muwajjil*) is not recoverable until the death of the husband, or the dissolution of the marriage by divorce, which last must be proved; and the mere fact of the husband and wife living separately is not sufficient evidence. 20th June 1841. 7 S. D. A. Rep. Ben. 40.

38. An alleged settlement of a man's property, made subsequent to a settlement of dower, and asserted to have been made with the consent of his wife shortly before her death she receiving a share of such property under the second settlement in lieu of dower, was held not to vitiate the Maharnameh in possession of her daughters, nor to bar their claim against their father, for their share of their mother's dower, as the conditions of the second settlement were not proved to have been fulfilled. 27th Aug. 1846. 1 Dec. S. D. A. N. W. P. 128.

39. A wife cannot claim the whole of her dower as *exigible* while her husband is alive, where no specific amount has been expressly declared to be exigible. In such cases, one-third of the whole must be considered exigible (*Maujjil*), and two-thirds not exigible (*Muwajjil*), such two-thirds being only claimable on the death of her husband. 1st June 1848. 3 Dec. S. D. A. N. W. P. 185.

40. A marriage settlement contained a declaration on the part of the husband, that, in lieu of one-third of the amount settled, he made over certain lands and other property; and an engagement to pay the remainder at his convenience. The wife died, and her brother, becoming entitled by inheritance to two-fifteenths of the property left by her, sued the husband of the deceased for the same. Held, that as the deceased never obtained possession of the lands mentioned in the settlement, the brother was entitled to two-fifteenths of the amount of the marriage settlement in money. 31st Aug. 1847. S. D. A. Dec. Ben. 491.

41. In an action for dower by the widow against the heirs of a deceased Mussulmaun, one of the heirs acknowledged the justice of the claim. Held, that, under the circumstances, such an acknowledgment was insufficient as a ground on which to form a judgment even against the party making it, the claim not being of that nature that it could be decided; nor could a decree be given in favor of the Plaintiff, as against one of the Defendants and not the other, they both standing in the same relation to the Plaintiff, being her own daughters, and both having inherited equal portions of their fathers property. 18th May 1841. 7 S. D. A. Rep. Ben. 31.

42. A Mahomedan sued to compel his wife to live with him, and to restrain her parents from preventing her. The defence was, that as the Plaintiff had not paid his wife her dower in full, by Mahomedan law he had no claim on her. Held, after obtaining the opinion of the Kazee of the Sudder Dewanny Adawlut, from the decision in Case No. 26, page 103, Sel. Cases published in 1843, that "if the dower agreed to be paid immediately, be not paid, a woman, although she has lived with her husband, may refuse to return to him until she receive her dower," and as it had not been proved that the dower had been paid, the decisions of the Lower Courts in the Plaintiff's favor were reversed. 30th July 1853. Morris' Sel. Dec. S. D. A. Bom. Part III. 41.

43. A Mahomedan widow having sued for recovery of dower nine months after her husband's death, her claim was resisted, 1st, Because thirty-five years had elapsed since the marriage; because she had relinquished her dower to her husband; and, because he had constituted the whole of his property *wuqf* before his decease. The Court overruled the plea of limitation, but dismissed the claim (apparently on the strength of the second objection) on the ground, that "although the deceased conveyed away the whole of his property in trust for religious uses in 1845, under circumstances which establish by strong presumption the fact of the Plaintiff's cognizance, no objection was made, nor was any claim for dower set forth until 1847, by which time the parties of the husband and wife had broken out into open quarrels." 21st July 1851. Dec. S. D. A. N. W. P. VI, 288.

44. A claim to excessive dower allowed by the Lower Court was rejected in toto by the Sudder Dewanny Adawlut, in consequence of the evidence being unsatisfactory and suspicious. 8th Sep. 1851. Dec. S. D. A. N. W. P. VI, 350.

45. Where there has been no specification whether the payment of dower is to be prompt or deferred, the whole will be held to be due on demand. 23rd Jan. 1854, Dec. S. D. A. N. W. P. IX. 33.

46. Claim on the ground of dower takes precedence of all claims by inheritance, consequently the heir (who had sold the property) had no power to transfer the property by sale till he had first paid the dower; and the claim by virtue of sale from him must be held contingent on the fact that the claim of the widow for dower has been satisfied. The plaintiff therefore, cannot claim possession, under the deed of sale till he has first paid the dower. 2nd Sept. 1852. Dec. S. D. A. Ben. 885.

NOTE.—It appeared that the widow had taken possession of the whole of her husband's estate, and Mylton J. dissented from part of the ruling of the Court, observing, "It has been shown by reference to a futwa of the law officer of this Court, quoted at a note at the foot of page 268, Vol. I. of Select Reports, that a Mahomedan widow cannot take possession of real property of her husband without consent of his heirs or judicial award, on a claim to dower. Dower must, by Mahomedan law be satisfied before other claims, but it is only a liability for which the husband's estate is answerable; the holder of a claim to dower has no right to appropriate the entire estate to the satisfaction of his own claim to dower."

47. Held, that in a suit by the widow of a Mosleem to recover from the joint heirs of her husband the amount of dower due under her marriage settlement, the period of the cause of action must be calculated from the date on which the widow was ejected by order of Court from the property which she had at first retained possession of in lieu of dower, and from the date on which the heirs were as such, placed in a position to be sued. 17th Nov. 1856. Dec. S. D. A. Ben. 841.

48. A precedent by the Court dated 24th March 1831, was referred to, to show that where the heirs of a Mosleem had been kept out of possession by a widow on plea of her holding in satisfaction of her dower, and the heirs had afterwards recovered possession, the merits of the dower not being tried, she was allowed to bring her suit twenty years after her husband's death. Ib.

DOWER.

ACCORDING TO THE SHIA LAW.

1. Where, on a marriage between parties of the Shia sect of Mahomedans, the sum of 500 Rs. was verbally specified as the

amount of dower at the reading of the ceremony in the Shia form, but the deed of settlement was executed by the husband for a much larger sum; it was held that the sum specified in the deed was the sum demandable. 19th May 1809. 1 S. D. A. Rep. Ben. 276.

2. Exactly the same point was subsequently decided in another case, in which the Court remarked that, agreeably to the doctrines both of the Shia and Sunniy sects, it is optional with the parties contracting a marriage to fix the amount of dower either before or after reading the marriage ceremony. 15th Nov. 1816. 2 S. D. A. Rep. Ben. 198.

3. Semble, among the Shias, the lowest and highest rate of dower is not fixed: any thing possessing a legal value may be given as dower; but the proper dower is 500 dirhems: a greater sum is not illegal, although considered improper by some Shia lawyers. 19th May 1809. 1 S. D. A. Rep. Ben. 276.

4. A Mahomedan of the Shiah sect, by a deed of dower charged his whole estate with a certain sum when demanded by his wedded wife, but did not impignorate his estate to secure the sum put in settlement. The dower was not demanded during the life time of the husband, and his widow at his death took possession of his estate in satisfaction of her claim. Held, by the *Sudder Dewanny* Court (North Western Provinces), and such decision upon appeal affirmed by the Judicial Committee, that the widow had a lien upon her deceased husband's estate as being hypothecated for her dower, and could either retain property to the amount of her dower, or alienate part of the estate in satisfaction of her claim. 20th July 1855. Moore's Ind. App. VI. 211.

5. Held also upon appeal, that a demand during the lifetime of the husband was not necessary, and that, although more than twelve years had elapsed from the date of the deed, and the time the widow set up her claim for dower, she was not affected by the provisions of Ben. Reg. III. of 1793. Sec. XIV, and that the limitation there provided for, formed no bar to her claim. Ib.

6. In a suit by the only brother and heir at law of a Mahomedan of the Shiah sect, claiming the whole of the deceased's estate, and for mesne profits, the issues raised by the pleadings were: whether a marriage had taken place between the deceased and the party in possession, who claimed to be his widow; and secondly, the validity of a deed of dower executed by the deceased in her favor. The Courts in India found these issues

in favor of the widow, and dismissed the suit. The Judicial Committee in affirming the Court's decrees on these points, held, further, that although the estate of the husband was hypothecated for the dower, yet, as the heir at law would be entitled to the residue after satisfying the widow's claim, he was by right entitled to an account; but, as the plaint was so framed as not to admit of an account being taken, the appeal was affirmed without prejudice to a suit being brought for administration of the deceased's estate, upon the footing of the marriage and deed of dower by the deceased being admitted in the suit. Ib.

DUES.

1. A claim by a Kazi to fees for the solemnization of a marriage was dismissed, as being repugnant to the provisions of Sec. 8 of Reg. XXXIX. of 1793, Bengal Code. 6th July 1835. 6 S. D. A. Ben. Rep. 31.

NOTE.—Vide Ceremony of Marriage.

Regulation III. of 1808, which provides for the appointment of Town Kazis in the Madras Presidency does not contain any provision analogous to Sec. 8, Reg. XXXIX. of 1793, of the Bengal Code, and it appears from the proceedings of the Madras S. A. dated 27th April 1837, that their Law Officers were of opinion that certain of the duties of a Kazi *could not be*, and that none of the duties *ought to be* performed by any other Officer than the Kazi, although he *may* in some particular cases, delegate his duty to other persons considered by him fit to perform it. In proceedings of the 14th August 1837, the Madras S. A., however, ruled, that Town Kazis could not, by the Sunnud of their appointment, be invested with authority over the Members of Military Corps. Civ. Rem.

Macnaghten at page XXV of his Preliminary Remarks, observes, that the Law Officers attached to the Provincial Court of Bareilly, suggested the expediency of marriage being performed by a Kazi, rather than its necessity, on the ground, that the guardian of the woman and the Kazi are the best judges of her consent, and her Agent should prove his commission to act on her behalf by witnesses in the presence of the Kazi. It does not appear to have been as yet judicially decided whether marriages ought in all cases to be performed by a Kazi, but as Town Kazis are dispersed throughout the country, little hardship would be imposed on the Mahomedan population were marriages required to be performed in their presence. Disputes regarding dower, inheritance and marriages, might, in the event of the enactment of such a rule, to a certain extent, be prevented.

2. Held by the Sudder Dewanny Adawlut, on a summary application, that it is not competent to a *Zamindar* to collect fees appertaining to the office of Kazi. The question of right however was still left open to a regular suit should the

Zamindar think proper to try it. 15th Jan. 1841. S. D. A. Sum. Cases Ben. 1.

3. In a suit by a Mokudum claiming *manpan* honors, and privileges, such as the right of receiving cocoanut, betel, &c. at marriages, and other festive occasions, the law officer of the Lower Court declared there is no such *wutun* recognized under the Mahomedan law ; but the Kazi of the Court of Sudder Dewanny Adawlut stated as the result of his experience that Mussulmaun Mokudums enjoy *manpan*. It was decided by a full Court that, the performance of certain ceremonies is optional ; and if performed by the persons who by right perform them, must be paid for. The respondent was not compelled by any law to perform the ceremonies for which the *manpan* is claimed by the appellant, as the constituted dispenser of such ceremonies ; and on the occasion in question, the respondent did not require the performance of these ceremonies, and it follows that appellant is not entitled to any fee or honor which would arise from such performance ; not because the *manpan* is not sanctioned by the Mahomedan law, but because the performance of the ceremony being optional he has not called upon to perform it. 23rd January 1850. Morris' Sel. Dec. S. A. Bom. Part II, 142.

Vide Tit. Damages and Kazi.

ENDOWMENTS.

1. On the death of a person appropriating property to pious uses, the power of appointing the superintendent of such property is vested in the executor of the appropriator. 6th Dec. 1798. 1 S. D. A. Ben. Rep. 17.

2. Vide Tit. Inh. 65-66.

3. The term Altamgha, or Altamghà-Inaam, in a royal grant, does not of itself convey an absolute proprietary right to the grantee, where, from the general tenure of the grant, it is to be inferred that a wuqf, or endowment to religious and charitable uses was intended ; and property so endowed cannot be alienated by the grantee or his representatives. 9th Dec. 1840. 2 Moore's Ind. App. 390.

4. Where certain Inaam land, granted for the service of a Musjid, was attached, in satisfaction of a decree obtained by a mortgagee of the property against the descendants of the original grantee, who had mortgaged it to him ; it was held, that, by the Mahomedan law, the mortgage was illegal and void, as land appropriated to religious purposes could not be sold or

mortgaged by any of the descendants of the original proprietor; and the Court agreed that the attachment should be raised. 1839. Sel. Rep. 204, Bom. S. A.

5. Wuqf implies the relinquishing the proprietary right on any article of property, such as lands, tenements, and the rest, and consecrating it in such manner to the service of God that it may be of benefit to man; provided always that the thing appropriated be, at the time of the appropriation, the property of the appropriator. 6th Dec. 1798. 1 S. D. A. Ben. Rep. 17.

6. Where in a claim of the respondent to the moiety of his father's estate, a religious endowment on the tomb of a Mussulmaun saint was pleaded by the appellant, but not proved, judgment was given for a division of the estate among the legal heirs. 17th Sep. 1805. 1 S. D. A. Ben. Rep 108.

7. On a claim by A (a female) against B and C for possession of certain lands, as trustee of a religious establishment, it being proved that the lands had been assigned for an endowment, but that the person who assigned them and settled the trusteeship on the claimant was proprietor of only an 11 anna share of them, the endowment was upheld for that proportion only, and possession was adjudged to the trustee. 4th Sep. 1807. 1 S. D. A. Ben. Rep. 214.

8. An assignment by a Mussulmaun for a pious endowment of the whole of an estate, of which he is only entitled to a share, is void, even as to his share, according to the doctrine of Ibram Mohammad, such share being at the time undefined; but according to Abu Yussuf, and a whole series of Futawa which coincide with him, the assignment of so much of the estate as was the legal share of the endower, is valid, and the Court decided according to this latter opinion. Ib.

9. An endowment for charitable and public purposes being a perpetual endowment, it is, according to the provisions of Reg. XIX. of 1810 of Bengal, the duty of the Government to preserve its application; and being excepted, by Sec. II. of Reg. II. of 1805, from the general operation of the Regulation of Limitation, no suit for its recovery is barred, until, at least, the officer entitled to administer it has been in possession of his office for twelve years. 9th Dec. 1840. 2 Moore's Ind. App. 390.

10. It has been held that, to constitute a Wuqf, or pious appropriation, it is not required by the Mahomedan law, that the grant should be express in the use of that term, provided the nature of the tenure be inferrible from the general contents of the

grant. 17th March 1814. 2 S. D. A. Ben. Rep. 110. 9th Dec. 1840. 2 Moore's Ind. App. 300.

11. By the use of the word Inaam in a royal grant, it does not follow, necessarily, that the property specified is conveyed in absolute proprietary right, if, from the general tenor of the instrument, it may be inferred that a Wuqf, or religious endowment, was intended. In such cases reference should be had to the custom of the country, and the question should be decided by the sense, attached by common usage to the expressions. 24th Aug. 1824. 3 S. D. A. Ben. Rep. 407.

NOTE.—It is a fundamental principle of Mahomedan law, that in every ambiguous expression of a person in conveying a right to another, reference should be had, first, to the custom of the country; and on failure of that, to the intention of the grantor, as stated by himself. As regards *Wuqf*, this is especially recommeded in the *Futawa-Allumgiri*. Morley.

12. Where, from the general tenure of a royal grant, it is to be inferred that a Wuqf was intended, the term Altamgha, or Altamgha Inaam, does not, of itself, convey an absolute proprietary right to the grantee, Wuqf lands not being subject to alienation, by the grantee or his representatives. 9th Dec. 1840. 2 Moore's Ind. App. 390.

13 According to the Mahomedan law a valid endowment may be verbally instituted without any formal deed; and though the witnesses to the fact depose vaguely, yet their evidence (corroborated by circumstances) is legally sufficient. 17th Feb. 1831. 5 S. D. A. Ben. Rep. 87.

14. A *general* dedication of land for the purpose of a cemetry establishes Wuqf, and excepts the same from descent to the heirs. 30th July 1831. 5 S. D. A. Ben. Rep. 136.

15. But the existence of tombs on land, unless the owner had consecrated it, does not bar partition except as to the actual spot covered by the tombs. Ib.

16. An instrument making an immediate dedication of property to the service of the Deity, though reserving a life interest to the donor, is a *Wuqf*, and is valid, though for more than a third of the donor's property. March 1838. 1 Fulton. 345. Sup. Ct. Cal.

17. But if the dedication be not to take effect until subsequent to the death of the donor, the instrument operates as a Will, and is only valid to the extent of one-third of the donor's property. Ib.

18. A Wuqf is valid without delivery, and is created by a mere verbal declaration of interest. Ib.

19. Although property of the nature of Wuqf (or assigned for pious purposes) cannot be sold, according to the provisions of the Mahomedan law, yet the custom of many Mahomedan towns permitting such sale, it would be held good by the Court. 9th Sept. 1811. 1 Borr. III. Bom. S. A.

20. And an appellant claiming certain Wuqf property under an alleged mortgage, the property having been held by the respondent for ninety-five years, and not being able to prove the mortgage; it was held that the respondent could not be ejected, as, though the sale of such property was illegal, it was customary in many Mahomedan towns, and consequently the probability of a sale was equally strong, as that it had been made over to respondent's family in mortgage. Ib.

21. Wuqf lands are not capable of alienation according to the Mahomedan law. 17th March 1814. 2 S. D. A. Ben. Rep. 110. 24th August 1824. 3 S. D. A. Ben. Rep. 407. 9th Dec. 1840. 2 Moore's Ind. App. 390.

22. A person having duly endowed property for religious purposes cannot afterwards alienate such property. 17th Feb. 1831. 5 S. D. A. Ben. Rep. 87.

23. The *Sajjadeh Nishin*, or superior of Wuqf property, is merely appointed to administer the affairs of the property, and has no power of alienating any portion of it. 5th Sept. 1835. 6 S. D. A. Ben. Rep. 22.

24. Land belonging to a Mahomedan, which is occupied by tombs, cannot be sold in execution of a decree. 21st Nov. 1842. S. D. A. Ben. Sum. Cases, 40.

25. The appropriator of a religious endowment has the power of appointing a Superintendent: on his death it is vested in his executor; or, should he have left no executor, then, in the ruling power. 6th Dec. 1798. 1 S. D. A. Ben. Rep. 17.

26. Although the Superintendent of a religious endowment may legally consign or bequeath the trust to his sons on his death bed without any express power to that effect, a consignment made during health is invalid, unless he have obtained the superintendence with such power. Ib.

27. And the ruling power may remove such devisors on proof of misconduct, and appoint a person of integrity in their stead. Ib.

28. A female may act as *Mutawalli*, and discharge the duties of the office by proxy. 4th Sept. 1807. 1 S. D. A. Ben. Rep. 214. March 1838. 1 Fulton, 345. Sup. Ct. Cal.

29. Held, that, under Sec. 15 of Reg. XIX. of 1810, a curator of a religious endowment, removed by the Board of Revenue on the ground of misconduct, may bring an action to try the sufficiency of that ground. 29th Nov. 1839. 5 S. D. A. Ben. Rep. 363. 22nd Sept. 1836. 6 S. D. A. Ben. Rep. 110.

NOTE.—This opinion the Court at large adopted, and it received the concurrence of the Allahabad Court of Sudder Dewanny Adawlut, to which the point was referred. But Mr. Rattray and Mr. Shakespeare of the Calcutta Court, held, that, in case of a removal directed or confirmed by the Government, the party removed had no remedy. Mr. Rattray remarked that no jurisdiction had been especially given in such cases, and Mr. Shakespeare considered that the precedent of Mahomed Sadik *v.* The Sons of Mohabut Ali was decisive as to the paramount power of Government. See supra Case 27. Morley.

30. Where several brothers (Mahomedans) had lived jointly in state and abode, and when one had sued for partition, charging, as part of the joint estate, certain *Pirotar* lands in the ministry of the elder brother as curator, the law officers (assuming that he had dedicated the same) declared that the curatorship would follow his appointment or direction, and, failing that, the selection of the Government; and that the joint state of the brotherhood established no pretensions to the officer on behalf of the other brothers. 30th July 1831. 5 S. D. A. Ben. Rep. 133.

31. The office of *Sujjadeh Nishin* of a religious endowment cannot be held by a female. 5th March 1835. 6 S. D. A. Ben. Rep. 22.

32. Dictum of Mr. Money: that a *Mutawalli* appointed under a testamentary trust, with power to nominate his successor, cannot, under the provisions of Secs. 11, 12 and 13. of Reg. XIX. of 1810, appoint a successor in his stead, without the knowledge and consent of the Revenue authorities. 22nd Sept. 1836. 6 S. D. A. Ben. Rep. 110.

33. The Plaintiff alleging that he had been illegally ejected by the Revenue authorities from the office of *Mutawalli* of a religious endowment, sued for restoration to such office in virtue of a *Tauliyat nameh*, executed by the then *Mutawalli* who had himself been appointed under a testamentary trust, with a power to nominate his successor. The Court being of opinion that the Plaintiff had never been put in possession of the trust

under the original deed of nomination and appointment in his favor, and that his personal management of the establishment and possession of the trust had not been established, dismissed the claim, but recorded their opinion, that, subject to the decision of Government, the Plaintiff had the best claim to the trusteeship. Ib.

NOTE.—The question of the validity of the appointment of the appellant to the trusteeship, and of the extent of interference which can be legally exercised by the Revenue authorities under Reg. XIX. of 1810 in regard to such appointments, were not positively ruled by the Judgment of the Court; but it may be assumed that the appointment of a successor by a Mutawalli, himself legally appointed, and duly empowered, by the original deed of appropriation, to make such appointment, and faithfully and efficiently discharging his trust, would be a legal and valid appointment; and that the trustee so appointed cannot be removed by the ruling power without proof or strong presumption of corruption or incompetency. See Princ. Mah. Law 5, 6, 8, 10, 67, 71 and Reg. XIX. of 1810 Ben. Code. Morley.

34. A Wuqif may appoint himself Mutawalli, and may reserve the profits of part of the consecrated land for his own use and his descendants. March 1838. 1 Fulton, 345. Sup. Ct. Cal.

35. Property belonging to a religious endowment is not liable to claims of inheritance. 5th March 1838. 6 S. D. A. Ben. Rep. 22.

36. Makbarah, or burying-ground is Wuqf, and consequently cannot be alienated. 15th Dec. 1846. 1 Dec. S. D. A. N. W. P. 250.

37. An inclosure, answering the purpose of a rude way-side Mosque was proved by the evidence to have stood on certain ground forty years before the action was brought for possession of the land. Held, that the purpose for which the land was originally appropriated ceased with the disappearance of the building; and no claim to it as Wuqf having been brought forward within twelve years from the date of the defendant's possession, the suit became subject to the general law, and that the Wuqf impropriation under the circumstances having virtually determined, the possession could not have been a wrongful one. 14th Feb. 1850. 5 Dec. S. D. A. N. W. P. 38.

NOTE.—Vide Case 50.

38. The alienation, temporary or absolute, by mortgage or otherwise, of Wuqf lands, though for the repair or other benefit of the endowment is illegal according to the Mahomedan law. 19th July 1846. 7 S. D. A. Ben. Rep. 268.

39. Where *Ryoti* holdings of Wuqf lands have been habitually sold by the ryots, under former Mutawallis, such right of transfer must be respected by their successors, until cancelled by an action at law. 5th June 1847. 7 S. D. A. Ben. Rep. 311.

40. Where the plaintiffs stated that the property alluded to in their plaint was long ago given in Wuqf by their ancestors, and that all they had to do with it at the time of bringing their suit was to superintend its interior economy, and to appoint proper persons to take care of it; it was held, that they were entitled to sue for the *Tauliyat* or management of the property, instead of for any proprietary right in the property itself. 23rd May 1846. 1 Dec. S. D. A. N. W. P. 68.

41. Where a claim to the Mukandari of a Mosque had been referred for arbitration to the Rajah's Court at Tanjore in 1811, and it was decreed that the right to manage the affairs of the Mosque vested in whomsoever, A, the descendant of the original founder, might see fit to appoint, and A's appointee, as was proved by the evidence, had been recognized as the successor of A in right of A's nomination; the Court of Sudr Adawlut upheld the right of such appointee, in preference to that of another claimant, who rested his title on his having been the disciple and nominee of A's predecessor. 29th Aug. 1850. S. A. Dec. Mad. 57.

42. Where a party had been put in possession of a mosque by a Collector, under the orders of the Provincial Court, from which orders no appeal had been preferred; it was held, that it was to be inferred that the Collector was satisfied, that, in so far as he had occasion to interfere, these orders were in no way opposed to the spirit and intentions of Reg. VII of 1817, and consequently that he had assented to such party's title to manage the mosque, and that the judge under such circumstances, was not competent to remove such party from the *mokandari* of the mosque in question. 30th Sep. 1850. S. A. Dec. Mad. 80.

43. A special appeal was admitted against the decision of a Zillah Judge on the ground that where the manager of a musjid abuses his trust, he may be ousted at the suit of any believer, but the appeal was subsequently rejected, without a decision on the above point on account of informality in the certificate. 23rd Jan. 1849. Morris' Sel. Dec. S. A. Bom. Part II. 15.

44. A Mussulmaun sued to establish his right to share in a money allowance drawn from the public treasury for the service of a mosque. The Sudder Ameen decided in his favor, but the Zillah

Judge held that as the allowance was paid by Government they were at liberty to pay it to whomsoever they pleased. The Sudder Dewanny Adawlut however remanded the case on the ground that although the payment of the allowance was at the option of Government, yet so long as the grant existed, the right to share therein was properly a subject for adjudication in the Courts. 17th Sep. 1850. Morris' Sel. Dec. S. A. Bom. 17.

45. In a suit brought for recovery of a mosque which had been converted into a private residence thirty-eight years previous to date of action, held that the claim was barred by the law of limitation. 1st April 1851. Dec. S. D. A. N. W. P. VI. 95.

46. The management of such establishments (endowments for the support of a shrine) is understood to consist in the appropriation of the receipts and offerings to the expenses of the religious service, and in the participation of the persons attached to the shrine in the surplus according to their hereditary shares, which they would enjoy by virtue of their office, as *Mootawallies*, and not as private persons. 16th June 1851. Dec. S. D. A. N. W. P. VI. 219.

47. In a suit to enforce a claim against the rents of shops built within the precincts of a mosque, which were pledged for the purpose of raising money for the repairs of the mosque, the Mahomedan law officer declared, "that it is the usual practice of the founders of mosques when causing shops to be erected within the precincts of a mosque, to appropriate them formally for the expenses of the mosque, and this is a valid endowment. In the present case therefore the shops must be considered *wuqf, unless it be proved that the original appropriator did not endow them.*" The Court however held that such proof was wanting. 6th July 1853. Dec. S. D. A. N. W. P. VIII, 433.

48. It was further ruled on the authority of Macnaghten's Principles and Precedents (page 328), that generally speaking "the gift or sale of endowed lands is illegal;" but "if the profts of the lands are not sufficient to cover the expenses of necessary repairs, the trustee is at liberty to dispose of such portions of the lands as may enable him to effect this purpose, because the preservation of buildings is in all cases of endowment a matter of indispensible necessity." Ib.

49. A party who had come into Court to be maintained in the possession of a mosque, and *Imambarah*, in virtue of the office of Mutawulli, his title to which was successfully contested by

the Defendants in the Lower Court, having deceased while the appeal was pending, it was held that the judge acted irregularly in admitting the heirs of the deceased, including his widow and daughters (the office not being hereditary) to carry on the appeal, and in passing a decree in their favor, and that he should have issued a notice upon the local agent, with whom the nomination of a successor rested under Regulation XIX. of 1810. 30th Aug. 1853. Dec. S. D. A. N. W. P. VIII. 608.

50. It was contended in this suit by the Plaintiffs on behalf of the Mahomedans of Dehlie, that certain ground taken possession of by Government, had been occupied by a mosque (which had disappeared), and that as the erection of a mosque upon a piece of ground constitutes that ground wuqf, or endowed property, the endowment remains, whether public worship continue to be performed in the buildings or not, and that the land can never be resumed or appropriated to any other than religious purposes. Held in accordance with a decision passed on the 14th February 1850, that as every trace of the building appeared to have been obliterated by time and neglect; and the ground was waste, and had not been made use of by the Mahomedan population for religious purposes within the period of twelve years preceding the institution of the action; the ground must be considered to have escheated to Government, whose Agent, under the authority of Sec. 4, Reg. XIX. of 1810, was fully competent to take possession of it. 22nd Sept. 1853. Dec. S. D. A. N. W. P. VIII. 679.

NOTE.—Vide Case 37.

51. It is no ground for refusing to receive a suit from a party, suing in the capacity of a Mootawalli, that his appointment was not sanctioned by a Committee acting under Reg. XIX. of 1810. The Court further observed, that that law, in no way interferes with the right of parties to appoint Mootawallis. 7th Aug. 1851. Dec. S. D. A. Ben. 487.

52. No documentary evidence to show that lands had been uniformly appropriated as *wuqf* having been produced, no property can be considered as such, unless it be satisfactorily established that it had been specially so appropriated. See pp. 337 and 338 of Macnaghten's Prin. Mah. Law. 20th Jan. 1853. Dec. S. D. A. Ben. 69.

53. A plaintiff who had for eighteen years held a portion of certain lands, though termed *wuqf*, as privately heritable and divisible lands, other portions being similarly held by other parties,

(coheirs with the plaintiff of the last occupiers), was not allowed to bring a suit for exclusive possession of the whole lands as *Mootawalli*, upon tender of proof of their being wuqf. 21st April 1853. Dec. S. D. A. Ben. 411.

54. Decision passed in accordance with a royal Sunnud of *wuqf*, declaring a joint right in all the lineal descendants of the grantee, to share, without any actual division of the property, in its proceeds, with the charge of the duties incident to the wuqf (an endowment for the maintenance of a tomb.) The benefit of the decree was also extended to two of the lineal descendants of the grantee who was not represented in the cause. 28th June 1853. Dec. S. D. A. Ben. 558.

55. The question of the power of a Mutawalli to remove a "Mussullee" of a Mosque as well as Mouzzin, having been raised, held, that the Mutawalli has the power to remove the Mouzzin and other servants of a Mosque, for neglect of the duties of the offices to which they were appointed. 27th April 1854. Dec. S. D. A. Ben. 193.

56. The term wuqf, as used in Mahomedan law imports property in which proprietary right is relinquished, and which is consecrated in such a manner to the service of God, that it may be of benefit to man. Held, therefore, that the provision made for the reading of the Koran at, and lighting of, the tomb of a testator cannot be looked upon as creating wuqf property. Vide p. 17, Vol. I. Sel. Rep.—21st Feb. 1857. Dec. S. D. A. 235.

57. Held, that the power of the appointment of a superintendent to an endowment, if not provided for by some special rule in a deed of endowment, must be governed by the ordinary rules of Mahomedan law; under which law, in the absence of all provision on the subject in the deed of endowment, a superintendent is authorized on his death-bed to appoint a successor, though the appropriator has not given him a general permission. 22nd April 1857. Dec. S. D. A. Ben. 640.

58. A special appeal having been admitted to try whether, in a case of an endowment, where the proceeds are appropriated to the discharge of a religious trust, the ordinary principle of the law of limitation is applicable, held, that the property was not wuqf, that is property devoted to the deity on relinquishment of proprietary right; but that it was property claimed by inheritance and subject to certain trusts, and thus, in regard to parties interested in the inheritance, the ordinary law

of limitation would apply. 18th May 1858. Dec. S. D. A. Ben. 1028.

NOTE.—The suit was instituted for the purpose of acquiring a share in the proceeds of an endowment, together with a corresponding interest in the performance of the duties of trust. Vide following case wherein the distinction, between a pure wuqf and heritable property, subject to certain trusts, is defined.

59. If an endowment, be wholly wuqf, i. e., if all the profits arising therefrom are devoted to religious purposes, a Mootawalli is not competent to grant a lease extending beyond the period of his own life; but if the office of Mootawalli be hereditary, and he have a beneficial interest in the endowed property, such property must be considered as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the Mootawalli and his heirs; and in such case, he is as competent, as other Zemindars, to grant leases even in perpetuity. 31st March 1858. Dec. S. D. A. Ben. 586.

NOTE.—The case of Rhadhabullah, Appellant, decided 8th May 1826. (Sel. Rep. IV. 151), wherein it was ruled, that a Shewait, had no authority to grant a lease beyond the period of his own life was referred to;—but the Court held, that that case only applies where the *whole* of the profits are devoted to a religious purpose.

60. A suit having been instituted for possession of certain property which the plaintiffs designated an estate of inheritance charged with certain trusts, and the Defendants having denied that the estate is of the nature of an endowment, not even subject to any trust, and alleged that they had purchased it from certain co-sharers of plaintiffs; held, that it was of the first importance to determine, clearly and fully, the nature of the property claimed, whether it be strictly endowed, or whether it be heritable property, subject or not to certain trusts; if it be the former, its alienation by sale will, of course, under Mahomedan law, be illegal; if it be property of the latter description, it will, so far as it is heritable, be capable of sale. 1st July 1858. Dec. S. D. A. Ben. 1218.

61. A Mootawalli having, in a former suit, been convicted of misappropriation of the property belonging to the wuqf estate, the law officer declared that he might be removed for such an offence. Held, also, that as he did not come into Court with clean hands he could not look to the Court to assist him. 14th March 1859. Dec. S. D. A. Ben. 285.

ESTOPPEL.

1. A widow of a Mussulmaun claimed the estate of her husband, who died twenty-six years before, under a gift from him in lieu of dower. There had been no possession on her part since his death ; and her son, in the interval, by her directions, had sued and obtained judgment as heir to his father's estate. Such having been the case, it was held that the widow was estopped from claiming under the gift, though she might come in, as one of the heirs for her share. 18th Nov. 1795. 1 S. D. A. Ben. Rep. 10.

2. The widow of a Mussulmaun alleged a deed of gift of the landed property of her husband in a suit by the heirs against the alleged donee. The deed was set aside as a fabrication ; and afterwards, on her suing for lands in satisfaction of dower, her claim was declared by the Law Officers to be barred by estoppel, because she, by her allegation of gift, had virtually declared that the lands were not the estate left by her husband, and could not claim them as being so. 6th June 1803. 1 S. D. A. Ben. Rep. 64.

NOTE.—The Court doubted the application of this doctrine to the case, but dismissed the widow's suit, on the presumption, from her declaration of the gift, that she must have remitted dower ; which, besides, had been pleaded by the Defondant. Morley.

3. A person pleaded a will, and that being rejected as a forgery, afterwards pleaded a gift, which she had formerly denied. It was held that such plea was estopped by repugnancy in Mahomedan law. 5th August 1803. 1 S. D. A. Ben. Rep. 68.

4. A Plaintiff having denied, that, a Defendant was a daughter of the deceased proprietor, and, on her death, having admitted it, and claimed the estate as her heir, such claim is estopped in Mahomedan law, on the ground of Tanâkuz, or repugnancy. 12th October 1803. 1 S. D. A. Ben. Rep. 73.

5. Where the Plaintiff, a Hindu woman, first denied her conversion to Mahomedanism, but subsequently claimed the property of a deceased Mussulmaun, as his widow and heir at law, it was held that, by reason of repugnancy in her statements, her claim was estopped under the Mahomedan law. 15th March 1841. 7 S. D. A. Ben. Rep. 20.

6. The respondent claimed certain shares of his father's estate for himself and the other heirs, the whole estate being retained by his brother the appellant. Partition was decreed by the City Court, according to the Mahomedan laws of inheritance ; but

on appeal to the Sudder Dewanny Adawlut, the appellant produced a will alleged to have been executed by his father, and which made a partial distribution of the property. This will, however, contradicting the plea on which the appellant had relied on in his original defence in the City Court, and, moreover, having been withheld for so long a time, was not considered by the Court as competent to preclude a judgment on the case according to the law of inheritance. 25th Nov. 1805. 1 S. D. A. Ben. Rep. 111.

7. A decree cannot be given in opposition to the Plaintiff's statements upon any material point; and when once a party to a suit has deliberately and intentionally denied any fact, he cannot afterwards admit it, and profit by it; nor can the Court, in passing the decision, proceed as though he had done so. 6th Sept. 1849. 4 Dec. S. D. A. N. W. P. 305.

8. Held, by the majority of the Court, that the previous statements made by a third party, can be no *absolute estoppel* to the plaintiff, to prevent his suing for possession of property on another ground, though those statements were considered important evidence in determining the validity of the transaction on which the suit was based. 28th Feb. 1857. Dec. S. D. A. Ben. 300.

EVIDENCE.

NOTE.—Practically, little attention was ever paid to the Mahomedan Law of Evidence, at least in the Madras Presidency, and so far back as 1828 the Judges of the Madras Court intimated to Government their intention of adhering to the English Law of Evidence as their legitimate guide, and as the acknowledged source of the provisions previously enacted in the Regulations for the conduct of judicial procedure. Arbuthnot's Select Reports, Preface, p. XXVII.

1. A deed was admitted, in conformity with the opinion of the law officers, on the testimony of the Kazi, whose seal was affixed to it (not his signature), and of the Munshi who drew it, though there was no subscribing witnesses. Another deed (of marriage settlement), to which the above apparently referred, but to the execution of which there was not the requisite proof, provided, that, in lieu of her dower the wife should take all the property the husband "then possessed, and might possess there after." The law officers declared that this could only have conveyed the property possessed by him at the time. 14th Aug. 1801. 1 S. D. A. Ben. Rep. 52.

2. The declaration of a person of unsound mind is insufficient to establish parentage, or even of one of sound mind, when the

parentage is claimed by another. 10th April 1820. 3 S. D. A. Ben. Rep. 23.

3. According to the rule of Mahomedan law, it is necessary that the Plaintiff should adduce evidence to prove his claim on simple denial by the Defendant; but when any special plea is urged the *onus probandi* rests with the Defendant. 6th Aug. 1821. 3 S. D. A. Ben. Rep. 102.

4. On questions of contracts or inheritance betwen Natives the Court will investigate according to the English, and not according to Native rules of evidence. 19th Jan. 1813. 2 Str. 191, Sup. Ct. Mad.

5. A Mussulmaun husband was admitted to give evidence in favor of his own wife. 1st Term 1843. 1 Fulton 143, Sup. Ct. Cal.

NOTE.—According to Sec. XX. Act. II. of 1855, a husband, and wife are now competent witnesses for or against each other.
Vide Tit. Mar. 9, Note.

6. A Mussulmaun refusing to be sworn to prove the execution of a note, alleging that he was a Munshi, and could not take an oath, but in fact, because he wished to defeat the action, was severely reprimanded by the Court. The Court in addition, told him it was fortunate for him that the Plaintiff had established his demand without his assistance; for had he failed for want of it, it would have been the duty of the Court to have considered what ought to have been done. 5th Feb. 1807. 1 Str. 225, Sup. Ct. Mad.

NOTE.—Act V. of 1840 substituted solemn affirmations for oaths.

7. Where witnesses to the fact of certain property having been constituted Wuqf, deposed vaguely, their evidence (corroborated by circumstances) was considered to be legally sufficient, 17th Feb. 1831, 5 S. D. A. Ben. Rep. 87.

8. Documentary evidence produced in proof of a sale was held to be liable to suspicion when produced by an alleged buyer, who was a servant of the Proprietor of the vended property, to whose hands according to the custom of the country, the seal of the proprietor may have been frequently entrusted. 27th June 1826. 4 S. D. A. Ben. Rep. 168.

9. The draft of an acknowledgment of a debt, and an agreement to pay the same, which was sworn to have been drawn up in the presence of the debtor but was not signed by him, was admitted as evidence of the debt by the Judicial Committee of the Privy Council, and a decree made in the lower Courts upon

such evidence was affirmed with costs. 5th Dec. 1837. 1 Moore's Ind. App. 461.

10. Where a party claimed certain property under a Hibeh nà meh, and did not produce the deed, alleging that it was lost, and giving various frivolous reasons for such loss, he was nonsuited with costs. Case 12 of 1815. 1 Mad. Dec. 133.

11. Copies of documents, for the originals of which no proof was given of search, cannot be received as secondary evidence. 30th Nov. 1836. 1 Moore's Ind. App. 19.

12. The recital of a power of Attorney in a will, affecting to transmit the authority conferred by it, is not sufficient evidence of the contents of such an instrument, in the absence of proof of its loss or destruction. 7th Dec. 1837. 1 Moore's Ind. App. 494.

13. The Defendant, by his answer, denied his execution of the bond. The Plaintiff in his reply, stated the accidental destruction of the bond, and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and, at the same time, ordered the fragments of the original to be produced. At the trial the Plaintiff produced the fragments, and under Section 2 of the Madras Regulation XVII. of 1802, put in as evidence a registered copy of the bond. The Courts admitted the registered copy as evidence, and found for the Plaintiff. The Judicial Committee of the Privy Council, on appeal, reversed this finding, on the ground, that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence. 16th June 1843. 3 Moore's Ind. App. 156.

14. A written acknowledgment of the husband to one of his wife's heirs, after her death, was held to be sufficient proof of the amount settled upon her as dower. 24th Aug. 1804. 1 S. D. A. Ben. Rep. 83.

15. Where marriage presents were sent and delivered by a Mahomedan to his wife, with due notice at the time that they were sent in lieu and satisfaction of dower, so far as their value extends, the formal acknowledgment to that effect, by the wife or her friends, was not held to be necessary. But where there was a want of proof on the husband's part of the delivery of the marriage presents, the Court held that the wife was entitled to obtain from him possession of her dower. 23rd May 1822. 2 Borr. S. D. A. Bom. 258.

16. Dower not exigible (Muwajjil) is not recoverable until the death of the husband, or the dissolution of the marriage by divorce,

which last must be proved ; and the mere fact of the husband and wife living separately is not sufficient evidence. 20th June 1841. 7 S. D. A. Ben. Rep. 40.

17. A party instituting a claim for a share of his grandfather's property was nonsuited on proof of separation, and the production by the other side of a Farikh Khat, or release, signed by him for his share of the property. 6th Nov. 1817. 1 Borr. 205 Bom. S A.

18. The question whether a will has been properly executed by a Mahomedan testator must be tried by the English, and not the Mahomedan law of Evidence. 19th Jan. 1813. 2 Str. 180. Sup Ct. Mad.

19. The fact of the Plaintiff being present when certain bills of sale were executed by his father and in no way objecting to the sale, was held to be sufficient evidence of his being a consenting party to such sale; and his claim to the property sold, by right of inheritance, was disallowed. 13th Dec. 1849. S. A. Mad.

NOTE.—The property in question was the dower of the Plaintiff's mother, which had been made over to her by a deed of gift by his father, who afterwards sold it to a third party. There is no doubt but that the deed of gift would, under ordinary circumstances, have acted as a complete bar to the subsequent sale, and that the Plaintiff would have been entitled to three-fourths of the property as his mother's heir, one-fourth being deducted as the legal share of the father, according to the provisions of the Mahomedan law of Inheritance. Morley.

20. The fraudulent alienation of property, in order to evade the satisfaction of decrees is so common, that when the wife of a Mahomedan sets up a claim to property, which apparently belongs to her husband, nothing short of full and satisfactory proof in support of the claim ought to induce a Court to uphold that claim. 9th May 1845. S. D. A. Dec. Ben. 152.

21. The evidence of a debtor examined as a witness in his brother's suit to a denial of his own debt, was held to be inadmissible. 19th July 1848. S. D. A. Dec. Ben. 693.

NOTE.—Such evidence would now be admissible under Sec. XVIII. Act II. of 1855.

22. In a suit between Mahomedans the Madras Sudr Adawlut ruled, that the Courts in this country, constantly at their discretion, have recourse to comparison of a disputed signature with one admitted to be genuine. 27th October 1852. Dec. Mad. S. A. 141.

NOTE.—Sec. XLVIII. Act II. of 1855 permits comparison of hand writing.

23. In a suit respecting some land, between a party who claimed by inheritance, and another who claimed by purchase, it was held, that, by Mahomedan Law, possession, with oral evidence of conveyance, gives a valid title in the absence of a written instrument. 3rd Sept 1851. Morris' Sel. Dec. S. A. Bom. 77

24. A Mahomedan Principal Sudr Ameen having ruled that the evidence of two witnesses was sufficient to establish a claim, the suit was remanded, in order that the testimony of these witnesses should be reconsidered in connection with other circumstances. 21st May 1850. Dec. S. D. A. N. W. P. v. 80.

25. In interpreting a deed, the Mahomedan Law as well as that of other countries, looks to the intention of the testator, so far as it is in conformity with, or not contrary to law, and for the purpose of determining that intention, all parts of the will are to be considered in relation to each other, so as, if possible, to form one consistent whole. 21st Feb. 1857. Dec. S. D. A. Ben. 235.

EXECUTORS.

Vide ADMINISTRATION.

FARZI.

NOTE.—This is an Arabic term, signifying a purchase in a fictitious name. It is synonymous with Benami, a sale or purchase made in the name of some other than the actual vendor or purchaser.

1. A grant obtained by the acquirer in the substituted name of a female relation (with the apparent intention of enabling her to take the estate at her death), is of no avail in Mahomedan law, against the right of the legal heirs of the real grantee. 8th Aug. 1808. 1 S. D. A. Ben. Rep. 250.

2. Farzi or fictitious names, in grants are not illegal, and the right of property rests in the person to whom the grant is actually made, and not necessarily in the person whose name is made use of. Vide 4.

3. Judgment of nonsuit was passed with reference to the regulations generally, and the Circular Order of the Court, No. 20, dated July 29th 1809, because the action was brought on the part of a Farzi. 22nd July 1833. 5 S. D. A. Rep. Ben. 313.

4. Grants obtained in Farzi, or fictitious or substituted names, are not illegal by the Mahomedan law; and the property conveyed by such grant is vested in the person to whom the grant is actually made, and not necessarily in the person whose name is

made use of. 8th Aug. 1808. 1 S. D. A. Ben. Rep. 250. 3rd April 1826. 4 S. D. A. Ben. Rep. 134.

5. In a *Benami* transaction, the party beneficially interested should sue in equity. 22nd July 1840. 1 Fulton 383. Sup. Ct. Cal.

NOTE.—This case was between Hindus, but has been inserted to show how relief may be obtained.

6. Where a plaintiff sued to set aside a sale, made in execution of a decree, of certain property, alleged to have been previously purchased in the name of his daughter-in-law; it was held, that as the latter, who was the nominal vendee, was not made a party to the suit, the Plaintiff must be non-suited. 3rd May 1842. 7 S. D. A. Ben. Rep. 95.

7. Where purchases are made in the name of other than the actual purchaser, it is not customary that any document should pass between the nominal and real purchaser as to the trusts or purposes of the purchase, but possession, both of the property and deeds, is delivered to the beneficial proprietors, and these are his title. Anon. 4th Term 1813. East's Notes, Case 1.

8. A familiar instance of quod fieri non debet factum valet, exists in those transactions, which are bad against third parties, but are binding upon the parties to the contract, and which are set aside, as against third parties, but by which the actual contracting parties remain bound inter se, as in Farzi purchases. The actual purchaser has no remedy against the ostensible purchaser, and quod fieri non debet factum valet, of this the precedent next following is a good example. G. *v.* Roshen Khatoon. Latour's Judicial Maxims, I. 241.

9. A party to evade a process of Court sold her estate to another, registered the transfer in the Collector's books, and during the whole period of Ward's management, received from him the profits. On the release of the estate, the vendee set up title as actual purchaser. Held in special appeal, arising out of an action by the vendor; to recover her estate, that the sale though nominal was effected by a deed, duly drawn out and registered, and possession given to all intents and purposes, by registration of mutations in order to deceive the public and to evade the rightful process of law; that no action could be founded on such a ground, as no one could by the aid of the law take advantage of their own wrong. 24th March 1846, Roshun Khatoon, Appellant. Latour's Judicial Maxims I, 242.

10. In this case the mortgagee claims to hold from a person represented by the Plaintiff, and the settlement was made with her expressly as mortgagee. But the Judge held the mortgage deed to be a fradulent contrivance of the defendant's husband. There has therefore been no bonâ fide possession of any kind by the Defendant. The Judge's decision in favor of the Plaintiff confirmed. 26th April 1859, Case 160. Sev. S. D. A. Ben. Rep. V. 659.

11. A deed of sale conveyed real estate, the property of a Defendant in a suit then pending in the Supreme Court at Bombay. Held, in the absence of satisfactory evidence of a *bonâ fide* consideration having been paid by the vendee, to be fradulent and void, as against the creditors of the vendor, and to have been executed for the purpose of defeating a sequestration. Held also that a party in possession under such a deed was not entitled to any allowance for sums expended by him for improvements upon the estate. 11th Feb. 1854. Moore's Ind. App. VI. 27.

12. Transfer of property by a judgment debtor to his wife after decree passed, disallowed on the presumption of fraud. 20th Jan. 1853. Dec. S. D. A. Ben. 69.

13. In a case between a Mahomedan and Hindoos, it was decided, that a suit cannot be entertained by a Court, when brought by a party, who admits in his plaint, that he employed the Defendant to make a *Benamee* purchase of an estate on his behalf, at a sale for arrears of revenue, to establish his right to the estate, against such Defendant, who declares the purchase made by him under Reg. XI. of 1822, to be *bonâ fide*. The Plaintiff as contravener of the law cannot be aided in the recovery of the property, and it makes no difference if his opponent is in the same predicament. 7th Dec. 1853. Dec. S. D. A. Ben. 961.

14. The fact of important deeds connected with the purchase and subsequent use of the property being in possession of the Defendants, held to be proof proprietary right, and that the purchase was made *benamee*, in the name of the ostensible purchaser. 16th April 1855. Dec. S. D. A. Ben. 145.

15. Held, that however objectionable the system of benamee transactions may be in theory, it is legal and in common use. It was consequently incumbent on the judge (of the Lower Court) to recognize it, and to follow those rules in discovering the merits of the particular transactions before him, which have been prescribed by the precedents of the Privy Council and of this Court.

Held further, that in the present case, in which the Plaintiffs filed the original deed of sale, the receipt for the purchase money and various other documents, and in which they allege, that though the purchase was made in the name of B, the r... purchaser was their ancestor A, and that B was a mere trustee for A, in whom rested the beneficial ownership, it was incumbent on the Plaintiffs *to prove the payment of the pu hase money by them*, and if they did so, any subsequent acts done in the name of the nominal owner would be explained by reference to the original transaction ; whereas, if they cannot prove that payment, their case must necessarily fall. 15th Feb 1859. Dec. S. D. A. Ben. 139.

NOTE.—However opposed Benamee or Farzi documents, may be to the ideas of a European, it is an indisputable fact that the practice of executing documents in favor of a party who has no beneficial interest in the transaction, is still very common. Documents whose genuineness there was no reason to doubt, have even been known to have been drawn out in favor of a Hindoo Deity. That eminent oriental scholar, Mr. C. P. Brown, of the Madras Civil Service, observes at page 212 of his Telugu Grammar, "In some bonds the name of the lender is omitted, and in lieu of it is written the name of some celebrated merchant or opulent person who has nothing to do with the transaction. This singular custom, still prevalent at Masulipatam," (where Mr. Brown was Judge, and he might with truth have added, throughout the Northern Circars,) "originated it would seem, under the Mussulmaun Government, when to be known as a money lender was dangerous. So current is the custom that the defence never objects to the bond on the ground that the real name of the lender is omitted." The custom is not confined to bonds alone, but to documents of almost every description. The progress of civilization since Mr. Brown's tenure of office, has rendered defences more technical.

FRAUD.

Vide FARZI.

GIFT.

1. A gift in lieu of dower is not invalidated by the marriage, on occasion of which the dower was settled, proving illegal by the return of the wife's former husband, supposed to have been dead. 26th Nov. 1800. 1 S. D. A. Ben. Rep. 31.

2. Where a Mahomedan had transferred by gift, all the property in his possession to his wife, in lieu of dower, it was held that such gift did not bar an action against his estate, for property which had come into his hands as executor. 8th Aug. 1806. 1 S. D. A. Ben. Rep. 150.

NOTE.—It appeared from the opinions of the Law Officers that a creditor could not have recovered against the wife from the assets which came into her

hands by gift from her husband, but that as he could have no power to give what was not his own, the donation of any property, not actually his, could be no bar to the suit. The Court, under this opinion, considered the amount of the property in the hands of the executor to be unalienable by him, and proper to be separated and deducted from the donation of his estate made by him in favor of his wife. The other point of Mahomedan law which came under consideration in the decision of the cause was the limitation of legacies to one-third of the testator's property exclusive of funeral charges and debts. Macn.

3. In a gift of partible property division is essentially necessary prior to delivery. 13th Feb. 1827. 4 S. D. A. Ben. Rep. 210.

4. Semble. There is no difference with regard to gift between the heirs of a Mussulmaun and a stranger. 8th May 1832. Sel. Rep. 80. S. A. Bom.

5. It was declared by the law officer that a gift of land, forming part of joint property, to be valid must be distinct, and the boundaries and extent of the property given be known. 31st March 1796. 1 S. D. A. Ben. Rep. 12.

6. To render a gift valid by the Mahomedan law, it is necessary that the subject of it be defined and distinct, and separated from all other property not intended to be conveyed, or which cannot be lawfully conveyed by gift; and when four out of twelve parts of certain property intended to be transferred were devoted to religious purposes, and which therefore could not legally be transferred by gift, it was held that the gift of the eight portions was invalid, as they were transferred simultaneously with the four portions, the transfer of which was illegal. 2nd Aug. 1820. 3 S. D. A. Ben. Rep. 44.

NOTE.—In the case of a gift made to two or more donees, the interest of each must be defined either at the time of making the gift, or on delivery. Prin. 50. There was another objection against the gift in this case which was not noticed by the parties, but which would have equally operated against the appellant; namely, that the donor did not relinquish possession during his lifetime, and the suit between the same parties for the personal property was decided in favor of the respondent on the same ground. Macn.

7. Held, that the Mahomedan legal objections of indefiniteness does not apply to a gift under which possession has been held for upwards of twelve years. 19th Nov. 1822. 3 S. D. A. Ben. Rep. 176.

8. In the case of a gift, under the Mahomedan law, specification of the property is not requisite, where the gift comprises the whole property of the donor, and is made in favor of only one donee. 10th Nov. 1835. 6 S. D. A. Ben. Rep. 44.

9. A gift is vitiated by confusion. 30th July 1813. 5 S. D. A. Ben. Rep. 136.

10. But, semble, the Court will consider that a gift for a consideration is, in effect, a sale and purchase, and is not vitiated by confusion of property, or defect of possession, according to the Mahomedan law. 28th Nov. 1832. 5 S. D. A. Ben. Rep. 239.

11. The Mahomedan law recognizes a distinction between a gift for a *consideration* (Hibeh-bil-i-waz), and a gift on consideration of a return (Hibeh-ba-shar-tul-iwaz); the latter *is*, the former *is not*, vitiated by confusion, and non possession. 24th April 1833. 5 S. D. A. Ben. Rep. 296.

12. Seizin of the donee is not requisite by the Mahomedan law, in order to render a Hibeh-bil-i-waz, or gift for consideration valid. 18th Nov. 1795. 1 S. D. A. Ben. Rep. 10.

13. In a suit for lands, to which the Defendant pleaded a title under a gift from his wife, lately deceased, made some years previous to her death, the question was whether there had been possession under the gift sufficient to give validity to the gift under the Mahomedan law. Held, that delivery of seizin was sufficient, and continued possession was not necessary. 31st March 1796. 1 S. D. A Ben. Rep. 12.

14. The gift of a portion of landed property, without distinct allotment of it, and delivery of seizin to the donee, is not valid in Mahomedan law. 27th June 1799. 1 S. D. A. Ben. Rep. 24—9th Aug. 1799. Ib. 25, and 27th Nov. 1805. Ib. 113.

NOTE.—According to the Mahomedan law, as ascertained in the case, seizin or possession by the donee, is indispensable to the complete effect and validity of the gift in his favor. Another point of law which came under consideration, but which did not influence the decision, is the validity of a joint gift without discrimination of shares. The authorities of Mahomedan law differ on this question, but the prevailing authorities admit the validity of such a gift. But it would not be valid for property included in, or inseparately attached to, that of another person (so as to be undefined.) Morley.

15. Possession is an indispensable part of a gift, which is not valid without it. 19th Jan. 1824. 2 Borr. 648, S. A. Bom.

16. Semble, a gift made at the point of death is not valid, even to pass one-third of the property, without possession being given. 8th May 1832. Sel. Rep. 80, S. A. Bom.

17. Under the Mahomedan law, seizin by the donee is essential to the validity of a gift. 20th April 1840. 6 S. D. A. Ben. Rep. 286.

18. An unconditional gift, without consideration is valid, though the donee be not of kin to the donor; and cannot be retracted where a transfer has been made by a donee to a third person, or where the donee has improved the gift, or where the donor and donee are spouses. 26th April 1834. 5 S. D. A. Ben. Rep. 355.

If after the execution of a deed of gift, possession be also given, the gift cannot be revoked. 9th January 1835. 6 S. D. A. Ben. Rep. 16.

20. If none of the legal obstacles to the resumption of a gift exist, the Civil Courts, on application being made by the donor, will grant permission to resume the gift, and not call for evidence as to the cause of desire of resumption; and such permission is legal and valid. 7th Nov. 1837. 6 S. D. A. Ben. Rep. 189.

NOTE.—The Kazi stated that the legal obstacles to the resumption of a gift are seven:

1. The incorporation of an increase with the gift.
2. The death of either of the parties to the gift.
3. A return of the consideration by the donee to the donor.
4. Alienation of the gift.
5. The parties being husband and wife.
6. Relation within the prohibited degrees of marriage.
7. Destruction of the thing given.

And see likewise. 3. Hed. 300, 301. Morley.

21. The widow of a Mussulmaun claimed the estate of her husband, who died twenty-six years before, under a gift from him in lieu of dower (Hibeh-bil-i-waz) dated 2 years before he died. There was no possession on her part since his death; and her son, in the interval, by her direction had sued and obtained judgment as heir to his father's estate. Such having been the case, the law officers held that, under the circumstances, the widow was estopped from claiming under a gift from her husband, though she might come in for her share as one of the heirs. 18th Nov. 1795. 1 S. D. A. Ben. Rep. 10.

22. A deed of gift from a father to his minor son for property, of which possession was not delivered at the time of the gift, or during the father's life (about four years beyond the date of it,) was held valid; for the son being a minor, it was presumed that the father was trustee for him. One-fourth of the property conveyed by the gift was adjudged to the son's widow, as his heir, in addition to her dower. 26th Nov. 1800. 1 S. D. A. Ben. Rep. 31.

23. At the suit of a widow against the brother of her husband, for her husband's estate, under a deed making a gift to her of all

his property in lieu of dower, it was adjudged that the widow was entitled to take under this deed all property possessed by the husband at the date of its execution, and, in the property subsequently acquired, had a right to share as an heir. 1 ... August 1801. 1 S. D. A. Ben. Rep. 52.

24. A deed of gift, by a woman to a minor, received into her family as an adopted son, for property of which possession was not delivered at the time of the gift, or during the life of the donor, who retained possession of it in behalf of the said minor, was held to be valid and complete in law, notwithstanding that the father of the said minor was alive; but a claim under that instrument to a portion of a joint undivided estate was rejected, the gift of such property being invalid according to the Mahomedan law. 3rd May 1816. 2 S. D. A. Ben. Rep. 180.

25. When a gift was not in the form of a Hibeh nameh, and was in its language obscure, yet as it contained the words dàdeh shud, "it was given" (by me,) the deed was declared to be good and valid. 9th Jan. 1822. 2 Borr. 179 S. A. Bom.

26. Where a widow claimed recovery of her late husband's effects from the widow of her step son; the latter produced a deed of gift by the husband in her favor, in reversion from his own daughter, and an acquittance from the mother-in-law. It was held doubtful whether the deed of gift was not invalid, as not being followed by possession, or whether it might not come under the denomination of a will, as providing for the disposal of property. The majority of the authorities were against the validity of the deed, and the Court reserved the point, holding that the claim of the mother-in-law was untenable on account of the Farikh khatt. 28th March 1822. 2 Bor. 153 S. A. Bom.

27. A filed a suit for the removal of a notice of mortgage laid by B. on a house bestowed in gift by the former owner under a Hibeh nameh to A. B, urged that the donee only held the house in mortgage of B's ancestors; but failing to produce any documentary evidence in proof of the alleged mortgage, the Hibeh nameh (in which the former owner declared the house to be his, and which was proved to have been executed in a public manner many years back) was declared to be valid, and it was decreed that the notice of mortgage should be removed, and B restrained from all further molestation to A's right of ownership. 30th May 1822. 2 Borr. 269 S. A. Bom.

28. Where a widow claimed, under a Hibeh nameh by her husband in her favor, to prevent the sale of her husband's house, attached in execution of a decree against him; it was held, that

as the property given had not been transferred to the possession of the donee, but had remained until the attachment partly in the hands of the donor, and partly in those of his cousin, the Hibeh nameh was invalid. 26th July 1823. 2 Borr. 611. S. A. Bom.

29. A Hibeh, or gift, is fixed by the Ijab-i-kabul, or "acceptance of the verbal gift" and a Hibeh nameh, in which the Ijab, or "verbal offer," alone is written, not the acknowledgment, or kabul, and which is not followed by possession, is invalid, and cannot be executed. Ib.

30. Land, being joint property, cannot be bestowed by a Hibeh nameh; but if the donor having separated his share, should give it away, and the donee *should take possession*, the gift would then be valid; for by the Mahomedan law, possession is an indispensable part of a gift, which is not valid without it. And in a suit by a Mahomedan against the heirs of a woman deceased, for her wazifah lands, his property under a deed of gift executed by her in his favor, the Court held, that possession of the lands by him not being proved, or that he enjoyed any income from them, dismissed the suit. 19th Jan. 1824. 2 Borr. 648. S. A. Bom.

31. A deed executed by a Mussulmaun during an illness of which he dies is good only for one-third. Barwell's notes 91. Sup. Ct. Cal.

32. Where a third of certain property had been decreed to a Mussulmaun by the Zillah Judge, he claiming the whole under a deed of gift passed to him from his brother-in-law previous to his decease; the Provincial Court reversed the decree, on the ground that the donee had not exercised ownership, and was not entitled even to the one-third share; but on appeal it was held, that as the donee was now left in a worse position than he was in before he appealed, and as the Provincial Court had decided on a point not referred to them, the decree of the Provincial Court should be amended, so far as to confine its operation to two-thirds of the property, the claim to which had been thrown out by the Zillah Judge's decree, deciding that the donee was not entitled to possess those two-thirds; but with regard to the remaining one-third it was decided, that as neither party had appealed from that part of the decision it should remain in force until brought before the Court in regular form. Costs in the Lower Courts were decreed to be discharged from the estate, but in the Upper Court to be defrayed by the appellant. 8th May 1832. Sel. Rep. 80 Bom. S. A.

33. Semble. A Mussulmaun making a deed of gift upon his death-bed, the deed cannot hold good further than it may be considered a bequest, by which a man who has heirs can bequeath only one-third of his property to a stranger, and then the party in whose favor it was passed would be entitled, without the consent of the heirs, to one-third of the property, whatever it might be, after all other claims on the estate had been liquidated. Ib.

34. Semble. If one of the heirs, of a Mussulmaun passing property by deed of gift to a stranger admit the gift, it will hold against his share. Ib.

35. A sued B for a share of certain properties, under a deed of gift, for a consideration executed by B's mother. B alleged that a forged deed in this form had been substituted for a gift in the ordinary form, because the latter was vitiated by confusion and defect of possession. He further alleged that the consideration was fictitious. The Sudder Dewanny Adawlut decreed A's claim on proof of the deed, and did not try the fact of consideration. 28th Nov. 1832. 5 S. D. A. Ben. Rep. 239.

36. A Kabin nameh, or deed of marriage settlement, containing a gift by the husband to his wife of the whole property possessed by him, or which thereafter might come into his possession, is valid in regard to the property in the actual possession of the husband at the time of the execution of the deed, but not in regard to property acquired subsequently by him, not existent property not being capable, under the Mahomedan law, of being made the subject of a gift. 30th June 1835. 6 S. D. A. Ben. Rep. 30.

37. Held, that a deed of gift of real property, legally executed, is valid against a deed of dower, previously executed by the same individual in favor of his wife, in which a sum of money, is specified as due to her, without mention of a pledge of real property as security for the dower debt. 18th July 1837. 6 S. D. A. Ben. Rep. 177.

38. A deed of gift for a consideration, *bona fide* executed by a trader to his wife, such trader not being shewn to be in debt at the time, or that he executed it in contemplation of insolvency, is good against subsequent dispositions of the property. Such a deed of gift by the Mohomedan law, must be construed according to the rules affecting the laws of sale, and the validity of a sale is derived, not from the seizin, but from the contract. 1st Term 1843. 1 Fulton, 152. Sup. Ct. Cal.

39. A deed of adoption by a Mussulmaun, declaring that the adopted son should "succeed to his property and title," was held, on appeal, to be inoperative and void, either as a deed of gift, or a testamentary disposition, no delivery of possession, and relinquishment by the donor, or seizin by the donee, having taken place. 5th February 1844, Moore's Ind. App. 245.

A Mahomedan transferred to his wife all his real and personal property in lieu of dower, by virtue of a Hibeh-bil-iwaz, stipulating that he should continue in possession, as *on the part of his wife*, until his death. The deed, immediately after its execution, was forwarded to the Collector for his information, and was attested before him. Held, that such a transaction was valid and that the gift was good as against the heirs of the donor. 23rd Nov. 1846, 1 Dec. S. D. A. N. W. P. 199.

NOTE.—There is no doubt, that where a husband assigns over to his wife, by deed, all his property, moveable and immoveable, in satisfaction of dower, or in lieu thereof, her right is completely established and the ownership of the husband is entirely divested, and seizin is not a requisite condition. (Macn. Prinl. Mah. Law 276) Such an assignment is not an absolute gift, in which case a seizin would be necessary; but rather resembles a sale or exchange, being a gift for a consideration, or Hibeh-bil-iwuz, to the validity of which possession is not essential (Macn. Prin. 52, 217, 221, 276, Note). If however, a sale be "imperfect" (Fasid), by reason of there being such a condition that either of the parties to a transaction should derive other advantage than such as might arise from the commutation of goods for goods, the rule is, that such imperfect sale confers no right of property on the purchaser,. until the latter be seized of the property with the consent of the vendor, where the legal defect is cured, and the right of property becomes complete in the purchaser (Mac. Prin. 42. R. VII, Baillie's Sale, 6 Note). The Law Officers both in the Lower Court and the Sudder Dewanny Adawlut, expounded the law as to the curing of the defect of an imperfect sale correctly, but they considered the above transaction imperfect, on account of the stipulation for the possession of the vendor after the execution of the deed, which was an advantage accruing to him other than that arising from the commutation of goods for goods. The Court decided the case in favor of the wife, on the ground of possession, considering that "her possession during the life time of her husband was abundantly proved, i. e. although her husband was deputed by her to manage the property on her behalf, he only acted as her agent; and that such a circumstance, to all intents and purposes, can only be regarded as her possession in the light contemplated by the law." But if the condition of the husband remaining in possession and actiug as his wife's agent rendered the sale imperfect, as the law officers considered, and also gave the wife a constructive possession of the property, as held by the Court, the agency clause caused and cured a defect in the transaction at one and the same time, which would seem an anomaly. Morley.

41. A Hibeh-bil-iwuz, alleged to have been given to a wife in consideration of a claim for dower, was set aside as fictitious and

collusive, chiefly on the ground of an agreement taken at the same time from the wife by her husband, so restrictive in its terms as to be evidently framed for the purpose of retaining the entire property under the control of the husband, from which there was in fact, no more than a nominal transfer to his wife in fraud of creditors. 8th April 1850. S. D, A. Dec. Ben. ...

42. The alienation of lands by gift, subsequent to a public notice of sale in execution of a decree, was held to be invalid. 3th June 1849. S. D. A. Dec. Ben. 202.

43. Where a Mahomedan woman in exchange for a champa kali, or necklace gave half of her property to another person, on condition that the latter should not alienate it, but leave it on her death, to two individuals named in the deed of conveyance; it was held, that the transaction being a gift for a consideration, was, according to Mahomedan law, in reality a sale; that the conditions of the deed were not binding; and that on the death of the vendee the property would descend to her heirs, to the exclusion of the persons in whose favor those conditions were made. 5th Feb. 1829. 4 S. D. A. Ben. Rep. 334

44. A hibeh-nameh, alleged to have been executed in favor of his first wife, in satisfaction of her dower, by a Mahomedan previous to a second marriage, was set aside, the Court observing, there are means of giving unquestionable validity to documents of this nature, unexpensive and easy of access, and if the parties interested refuse to use them, they cannot be surprised if the documents are rejected by the Civil Courts. The well known habits of the Mahomedan population, in respect to marriage settlements, render it incumbent on the Courts to guard with suspicious caution all deeds connected with such settlements. 19th Sept. 1850. V. Dec. S. D. A. N. W. P. 333.

45. A Special Appeal was admitted to try whether the Judge had decided against the gift in accordance with Mahomedan law or not, the Moulavie of the Court having stated verbally to a question put to him, that the usual legal proof of a gift, of which possession, is the main feature, being forthcoming, a buksheesh putra, is not essential to its validity, *even when debts are due*, and that the gift therefore should be held good. Held that the exposition of the Mahomedan law in the Zillah Court was not, as stated by the Judge, that without documentary evidence of property having been disposed of, a claim of having received it in gift *cannot hold to bar the right of creditors*, but was to the effect that delivery by the donor, and acceptance and possession by the donee, must concur to make it valid. The exposition

being approved of by the kazee, the decision of the Prin. Sud. Ameen, who found these essentials to the validity of the gift had been proved, was upheld. 12th May 1855. Morris' Cases, S. D. A. Bom. II. 103.

46. The following question having been put to the Mahomedan Law Officer, "A Mussulmaun on account of old age and infirmity, without executing any written deed of gift, or mortgage, transferred without any specification of shares, (bil ijmal) his landed estates to his three sons (of whom the defendant is one,) by means of a petition preferred to the Collector. Two out of the three sons, at their father's solicitation relinquished the villages to the latter, but the third son refused to do so representing that he had given to his father the surplus collections of the villages. Under these circumstances, is the transfer valid, or not, and should the recusant son be made to give up the villages or otherwise?" The reply was as follows. "The absence of a written deed does not invalidate the transfer, which may be proved by oral testimony, with, or without, documentary evidence; therefore, if this person transferred his landed property to his three sons, *and put each of them in possession of his separate share*, and effected the registration of each of their names in the place of his own, and they collected the rents, whether they kept the same for themselves, or made them over to their father, with their own free will *(tuburrooz)*; under such circumstances, this transfer is valid, according to Mahomedan law; and the father has no right to resume the property from his sons, the relationship between the parties being prohibitory of such revocation, and the son who declines to restore the estates, cannot, legally be compelled to do so." The Court approved of the exposition and acted thereon. 30th March 1852. Dec. S. D. A. N. W. P. VII. 109.

47. The Plaintiff gave up her share of an estate to the defendant, on condition that if a son should be born to the defendant by her husband, the share should vest in the son, and in the event of no such son being born, the share should revert to Plaintiff and her heirs. Held, that the gift was conditional, and that the property was taken in trust by Defendant, who bound herself to restore it should no son be born to her by her husband, or should the possibility of such an event cease to exist. 20th May 1852. Dec. S. D. A. Ben. 437.

NOTE.—The Court abstained from deciding whether a Hibba to a party unborn, is, under the Mahomedan law, valid or not.

48. Held, that under the Mahomedan law, seizin is necessary to render deeds of gift valid. 24th Nov. 1853. Dec. S. D. A. Ben. 932.

GIFT.

ACCORDING TO THE IMAMEYAH DOCTRINE.

49. By the law, as received by the Shia sect, gift of an aliquot part of an undivided whole is valid. 29th May 1832. 5 S. D. A. Rep. 213.

50. According to the law of the Shia sect an undefined gift is valid. Ib. as cited in Ramrutton Rae *v.* Farrook-oon-nissa. P. C. Cases.

NOTE.—In a former case (Azeem-oodin *v.* Fatima Beebee. 27th June 1799. 1 S. D. A. Rep. 24.) The Law Officers of the Court, after propounding the doctrine of the Suniy Jurisprudents as to gift of part of an undivided whole and possession, cited these extracts from the Sharaia-al-Islam as showing the doctrine of the Shia Doctors on the same subject— "As to immoveable and non-deliverable property, possession arises from abandonment of the donor. In regard to moveable and deliverable things, it arises from delivery and transfer—gift of undivided property is valid, like that of divided, and possession thereof is established by the surrender of the whole to the donee. But if the tenant in common refuse, let the donee direct him to appoint him to be Agent for possession; should he refuse, let the ruler appoint an Agent to hold for both, to whom the donor may then transfer. The gift is not valid of that of which possession cannot be given—for instance, of a bird in the air, and of a fish in the river." "If he give what the donor already holds, it is valid, and there is no need for the permission of the donor to take possession, nor that the time during which possession is possible should have passed. But to this latter position some Jurisprudents scarcely incline." Morley.

GUARDIAN.

1. By the Mahomedan law a widow appointed guardian by her husband of their infant child is entitled, in case of injury or disseizin done to the infant's property, to sue in the infant's name alone, or coupled with her own as guardian. Anon. 4th Term 1813. East's Notes, Case 1.

2. The possession of property by a guardian is no bar to the admission of a suit in formâ pauperis on behalf of his ward. Mt. Azul Sultan Petr. 11th Sept. 1843. S. D. A. Ben. Sum. Cases 52.

3. The Registrar of the Supreme Court, Plaintiff in a suit, as guardian of a minor (a Mahomedan female) was nonsuited,

as not legally authorized to act in her behalf. 20th Sept. 1848. 7 S. D. A. Ben. Rep. 559.

NOTE.—The Registrar sued as administrator to the estate, and guardian of the minor. The Court were of opinion that, under Sec. 3, of Reg. V. of 1799, he could not institute a suit on account of the minor without special appointment as guardian, or being so according to the Mahomedan law. Under that law, in default of those paternal relations who, by blood, are authorized to act as guardians to minors, the ruling power is the guardian. Morley.

4. A guardian appointed by Will cannot be removed by summary suit. Mussummaut Nazeer-oo-Nissa, Petr. 8th March 1855. Case 165, Colvin, J. Sev. S. D. A. Ben. Rep. III. 629.

5. A minor, a Mahomedan female, cannot execute a general power of Attorney while in charge of a duly appointed guardian. Ib.

6. Held in the case of a Mahomedan mother, who had been divorced from her husband, and who was not shown to be of bad character, that her claim to the guardianship of their daughter, up to the age of 9 years, was superior to that of the father. 30th January 1849. Morris' Sel. Dec. S. A. Bom. Part II, 29.

7. A guardian of a minor having been nominated by Will, the Zillah Judge has no authority to interfere. His order inviting candidates for the office of guardian, reversed in summary Appeal preferred to the *Sudder Dewanny Adawlut*. 30th April 1858. Mahomed Ally Chandharee Petr. Case 44, Sev. Rep. S. D. A. Ben. V. 119.

8. An Executor appointed by a deceased person is chargeable with the duty of defending Civil actions brought against his children who by reason of minority are incapable of appearing in Court, and defending themselves, and, in default of such appointment by the deceased, the ruling power should appoint a person for the purpose, 12th May 1856. Dec. S. D. A. N. W. P. XI. 344.

9. For the purpose of disposing of an infant in marriage, an uncle is the guardian preferentially to the mother, and as regards the custody of the property of a minor, whoever has charge of his or her person is the legal guardian. Ib.

See INFANT.

HABEAS CORPUS.

A rule nisi for a habeas corpus to bring up an illegitimate infant, in the charge of A B, having been granted on the application of the mother of the child, was discharged, on its being proved that it was more for the benefit of the child to remain under the protection of A B. Exparte Intiazzoon Nissa Begum. 14th Sept. 1814. 2 Str. 271. Sup. Ct. Mad.

HIBBA-RA-SHURT-OOL-IWUZ.

HIBBA-BIL-IWUZ.

HIBBA-NAMEH.

See GIFT.

HINDOO.

1. Held that the Defendant being a Hindoo is not entitled to take a part in a Mahomedan festival (the Mohorrum). 27 April 1849. Morris' Sel. Dec. S. A. Bom. Part II. 91.
2. The Sudder Dewanny Adawlut at Calcutta upheld the validity of a marriage between a Mahomedan and Hindoo female. See 33 Tit. Marriage.

HOUSE.

1. A man may raise the roof of his own house as high as he pleases, although he has no right to open new doors and windows over looking another man's property. 1st Oct. 1811. 1 Borr. 381 Bom. S. A. Vide Tit. Windows.

HUSBAND AND WIFE.

See MARRIAGE.

INFANT.

1. Held on the opinion of the Kazi-ul-kozat, that when a Mussulmaun girl approaches the age of puberty, and publicly declares herself to be adult, and her outward appearance indicates nothing to the contrary, her declaration must be credited, for she then becomes subject to all laws affecting adults. 21st May 1840. 2 Sev. Cases 299 S. D. A. Ben.

2. A father was declared to be disallowed from filing a bill in behalf of himself and his infant children, without first presenting a petition to be appointed next friend to the infants. Macnaghten, J. condemned the practice, and declared that he would not sanction it. Noor Rohoman *v.* Shaik Ahmed Ahmed. 3rd Term 1823. Cl. R. 1829, 268 Cal. Sup. Ct.

NOTE.—By the present equity rules, no bill can be filed for an infant, except by leave of the Court, or a Judge in Chambers, on affidavit stating why it is for the infant's benefit. This rule is peculiar to the Supreme Court. 2 Sm. and Ry. 130. Morley's Dig. Vol. 1.

3. Where in a marriage of two minors, the legal guardian of the husband not having been present at the marriage, and not having given his consent to the dower, and the husband on coming of age had not confirmed his acknowledgment of the dower; it was held that the dower was not demandable from the husband. 8th March 1817. 2 S. D. A. Ben. Rep. 233.

The Defendant a minor, executed a bond for money lent, bearing his seal and also the signature of the Agent to the Governor General, and, after attaining his majority, paid certain money in part liquidation of the sum lent. On a suit for the recovery of the balance, the Defendant pleaded the invalidity of the bond, in consequence of his minority at the time it was executed. Held, that the agent must be looked on as the guardian of the Defendant at the time the money was borrowed; and as there was no doubt that the Defendant absolutely received the money, and applied it to his own use, and had made payments after attaining his majority, that the bond was binding against him. 28th June 1848. S. D. A. Dec. Ben. 595.

5. If the minor be under the tutelage of a guardian appointed by the Court of Wards, his minority is considered to have terminated at the date when such guardian shall be removed by that Court. 5th July 1848. S. D. A. Dec. Ben. 644.

NOTE.—Under Sec. 10 of Reg. X. of 1810 (Ben. Code) even a manager is prohibited from paying any debts although adjudged previous to giving information to the Collector, who must first report the same to the Court of Wards and obtain their sanction for its liquidation. Morley.

6. The possession of property by a guardian is no bar to the admission of a suit in *formâ pauperis* on behalf of his ward. 11th Sept. 1843. S. D. A. Ben. Sum. Cases 52.

7. A minor, a Mahomedan female, cannot execute a general power of attorney while in charge of a duly appointed guardian. 18th March 1855. Case 165. Colvin J. Sev. Rep. S. D. A. III. 629.

8. Held in the case of a Mahomedan mother, who had been divorced from her husband, and who was not shown to be of bad character that her claim to the guardianship of their daughter, up to the age of 9 years, was superior to that of the father. 30th Jan. 1849. Morris' Sel. Dec. S. A. Bom. Part II. 29.

9. By Mahomedan law, the period of majority in males is judged of according to the puberty of a person of that persuasion. 8th July 1857. Case 312. Sev. Rep. S. D. A. Ben. IV. 851.

10. A party (a Mussulmaun) who by new agreements and public acknowledgments after attaining his minority, renews and consents to conditions made by his mother during his minority on his behalf, in consideration of sums advanced for carrying on a litigation in which he was interested, held by the Court to be incompetent to repudiate those conditions, except upon proof that the agreements and acknowledgments were obtained from him by fraudulent misrepresentations as to what had been done by the person claiming on the ground of such advances, in furtherance of his the said party's interests in the litigation. 1st June 1853. Dec. S. D. A. Ben. 494.

11. In a case wherein the validity of a sale was questioned on the ground of its having been effected by a Mahomedan female, who was alleged to have been a minor at the time, the Law Officer of the Court declared, that a female is of age after the completion of the fifteenth year. 22nd Jan. 1857. Dec. S. D. A. N. W. P. 21.

12. Mahomedan law fixes the age of 16 as the period of majority (for males) only conditionally, on competency not being manifest, at an earlier age, and Regulation X. of 1793, which fixes 18 as the full age of Zemindars under the Court of Wards, cannot, as urged, be held to apply to tutelage imposed or removed by the Civil Courts under Regulation I. of 1800. 16th July 1856. S. D. A. Ben. 569.

INHERITANCE.

NOTE.—In the Mahomedan Law of Inheritance as administered in British India, we find few conflicting doctrines when compared with the same law in the Hindoo Code. This arises from the former being more defined, and based on more invariable principles, than the latter, besides being restricted in its application, in India, to the tenets of the two sects, viz. those of Aboo Haneefa, and his disciples, Aboo Yoosuf and Mahomed, and those of the Imamiyah or Shia sect. The general law of the country is, that of Aboo Haneefa, and no other is administered in the Supreme Courts in cases of Mahomedan Inheritance. The Imamiyah Code is admitted by the Honorable Company's Courts, where both parties are Shiahs. Morley.

1. Two-thirds of the property of the deceased, after payment of debts, necessarily fall to the heirs, at law, notwithstanding any bequest to the contrary. 9th August 1799, 1 S. D. A. Ben. Rep. 26

2. The sisters of a deceased Mussulmaun are excluded from the inheritance by the father. 5th August 1803, 1 S. D. A. Ben. Rep. 68.

3. Parties related in the male line in the fourth degree of descent, to a common ancestor who was in the sixth degree of the last legal proprietor of an estate, were held to be entitled to succeed, to the exclusion of one who was only related to such last proprietor through females. 5th August 1805, 1 S. D. A. Ben. Rep, 98.

Where a Mussulmaun, shortly before his death, made over his share of a Talook to his widow in satisfaction of dower settled on her at marriage, and she held it till her death, thirty-three years afterwards, without her title being disputed by any of the heirs of her late husband; it was held that her heirs were entitled to inherit such share as having belonged to her. 22d July 1808, 1 S. D. A. Ben. Rep. 243.

5. On the death of a person possessed of real and personal property without issue, and having brothers and sisters of the whole blood, and other brothers and sisters of the half blood, by the same father, the brothers and sisters of the whole blood succeed to the entire property to the exclusion of the half blood. 24th July 1817, East's Notes, Case 65, Sup. Ct. Cal.

NOTE.—Semble, *aliter* where the property was acquired by the same common father, which on his death, came into possession of the eldest brother, who continued to carry on the father's trade upon the joint capital. Morley.

6. If a Mussulmaun die, leaving the son of a brother, and the son of a sister, their parents having died in his life time, the son of the brother will take the whole property, to the exclusion of the sister's son. 15th February 1820, East's Notes, Case 113, Sup. Ct. Cal.

7. By the law of Inheritance as received by the Shia sects, a brother is entirely excluded by a daughter. 30th Dec. 1808. 1 S. D. A. Ben. Rep. 268. 12th August 1822. 3 S. D. A. Ben. Rep. 164.

8. The decision in this last case was affirmed on appeal by the Judicial Committee of the Privy Council. 24th Feb. 1841. 2 Moore's Ind. App. 441.

9. A suit was instituted by A for the recovery of property in the possession of B, inherited by her, as she alleged, from C, a Mussulmaun prostitute, deceased, and wrongfully possessed by B as adopted daughter, the latter being alleged, also, to be a Hindu. But it appearing that all the parties were Hindus, being of the caste of dancing girls and prostitutes, though calling themselves Mussulmauns, and that A's relationship to C was five degrees distant, and that B was her niece; the Court under the circumstances dismissed the suit. 19th June 1844. 7 S. D. A. Ben. Rep. 76.

10. The son of a deceased Mussulmaun, by a slave girl, was held to be entitled to share equally in the inheritance of his father with another son by the lawful wife of the deceased. 20th July 1801. 1 S. D. A. Ben. Rep. 48.

NOTE.—For the law of parentage, See 1 Hed. 376. et. seq. Macn. 61 er. 31, 32, 33, 85. Baillie In. 33.

It is necessary in order to establish the parentage of children by slave girls, that the father should acknowledge them, if they are by different mothers; but if they are by the same mother, the acknowledgment of the first born is sufficient. Morley.

11. Where A. claimed, as daughter (by a concubine) a share of her deceased's father's *Zemindari;* it was held, on proof that she was the daughter of the deceased, and had been acknowledged by him as his child, that she was entitled to a share in the inheritance. 3rd Dec. 1811. 1 S. D. A. Ben. Rep. 35

NOTE.—It is presumed that the legal opinion, in this case, was induced by the fact (which was indeed deposed to by several of the witnesses), that the mother of the respondent was not only the concubine, but the slave of the deceased *Zemindar*. The acknowledgment of parentage alone would not avail in the case of a free woman not married to the acknowledger. Macn.

12. The son of a Mussulmaun, by a slave girl, will inherit as a son, if the father had acknowledged him as such in his life time. 2nd Term 1818. East's Notes, Case 78. Sup. Ct. Cal. 17th Jan. 1848. S. D. A. Dec. Ben. 18.

13. A son born to a Mahomedan man and woman, living together as husband and wife, though not publicly married, and where there is nothing to invalidate the presumption of their being married, will inherit equally as a son in proved wedlock, and is not divested of his right as one of the heirs to the estate of his paternal uncle, though discarded by the latter. 28th April 1814. 2 S. D. A. Ben. Rep. 112.

14. The acknowledgment of a brother by the heir entitles to inheritance. Ib. Vide 3 Hed. 172.

15. Quære. Whether illegitimate children of a Mussulmaun by a woman, not a slave, will succeed to the estate of their father by reason of their having been acknowledged by him as his children? In the goods of Shaik Nathoo. 24th July 1844. 1 Fulton 483. Sup. Ct. Cal.

NOTE.—The question was not decided in this case, the decision proceeding on different grounds: the acknowledgment of the father seems to be the main thing to entitle a bastard to a right of succession. 1 Hed. 384. Macn. 85, 132. Morley.

16. Where a Mussulmaun died, leaving a widow and a nephew, who for some time had lived with him in the apparent capacity of his heir and adopted son; the widow claimed the whole estate of the deceased, under an alleged will, and the nephew made a similar claim as an adopted son; the Provincial Courts directed a Kazi and two Mooftis to investigate the matter; and on their reporting that neither claim could be considered as established, and that the inheritance should be divided according to the Mussulmaun laws, the Council confirmed their decree, and, in accordance with it, held that the estate should be divided into four shares, of which one should be given to the widow and three to the brother of the deceased, who was next of kin, and father of the nephew who claimed as adopted son. The Patna Case, 1777. 3 S. D. A. Ben. Rep. 195.

17. Itumghà lands were granted to a mother for the support of her family, and remained to them (a son and two daughters) at her death; according to the law of inheritance the lands will be divided into four parts, of which two will fall to the son, and one to each of the daughters: a pecuniary pension was similarly divided. 29th March 1798. 1 S. D. A. Ben Rep. 16.

18. The heirs of a Mussulmaun deceased being a mother and two sons, the estate will be divided into twelve parts, of which the mother will take one-sixth or two, and the sons five each. 20th July 1801. 1 S. D. A. Ben. Rep. 48.

19. The heirs of a Mahomedan deceased being a widow, a mother, a son, and a brother, the estate will be divided into twenty-four, or seventy-two parts, of which the widow will take one-eighth, or three, or nine shares; the mother one-sixth, or four, or twelve; and the residue, or seventeen, or fifty-one, will go to the son, the brother taking nothing. But the son dying, one-third of his share, viz. $\frac{17}{72}$, goes to his mother, the widow, and the residue to his uncle, his father's brother. Hence the division will be: the widow $\frac{26}{72}$, the mother $\frac{12}{72}$, the brother $\frac{34}{72}$. On the mother's death her son would take her share, and have $\frac{46}{72}$. 14th Aug. 1801. 1 S. D. A. Ben. Rep. 52.

20. Any male in whose line of relation to the deceased no female enters, is residuary, and succeeds as such, preferably to any distant kindred (Zu-al Ihram) or those in whose line of relation a female enters. 5th Aug. 1803. 1 S. D. A. Ben. Rep. 68.

21. The heirs of a Mussulmaun deceased being a widow, a son, a daughter, and two brothers, the estate will be divided into twenty-four parts, of which the widow will take one-eighth, or three; the son fourteen; and the daughter seven parts; the brothers take nothing. Ib.

22. And being a mother, a sister and father's brother, into six parts of which the mother takes one-third or two; the sister one-half or three; and the uncle one share. Ib.

23. And being a husband, mother, son, and a daughter, into thirty-six parts; of which the husband takes one-fourth, or nine; the mother one-sixth or six; the son fourteen; and the daughter seven shares. Ib.

24. A Mahomedan deceased, leaving a son, a daughter, and three widows, his estate will be divided into twenty-four parts; of which the widows will take three, or one-eighth of the estate between them; of the residue, fourteen, or two-thirds of the whole, will go to the son; and seven, or one-third to the daughter. 7th May 1804. 1 S. D. A. Ben. Rep. 78.

25. And the first and third widows dying, the son takes two-thirds, and the daughters one-third of the two twenty-fourths which fell to them. Ib.

26. The daughter of a deceased Mahomedan inheriting an unpaid portion of her mother's dower, and her heirs being at her death, her husband, a daughter, brother and three sisters; the husband takes a fourth of her estate, (viz. the unpaid dower); the daughter a half; the brother a tenth; and the three sisters a twentieth each. 24th Aug. 1804. 1 S. D. A. Ben. Rep. 83.

27. The heirs of a Mussulmaun being a second wife, a son by a first wife, a son by a second wife, and a daughter of the second wife, the estate will be divided into forty, or nine hundred and sixty parts; of which the second wife will take one-eighth, or five, or one hundred and twenty; each son fourteen, or three hundred and thirty-six; and the daughter seven or one hundred and sixty-eight. The daughter subsequently dying, leaving a son and two daughters, her share is thus divided: one-sixth, or twenty-eight go to her mother, seventy to her son, and thirty-five to each of her two daughters. The second wife dying, her son takes her share. Hence the division is: son by the first wife $\frac{336}{960}$; son by the second wife $\frac{484}{960}$; grandson by the daughter $\frac{70}{960}$; and two grand daughters by the daughter $\frac{35}{960}$ each. 25th Nov. 1805. 1 S. D. A. Ben. Rep. 111.

28. The heirs of a Mussulmaun being a widow and two sons, the widow takes an eighth, and the sons equal shares of the residue. 27th Nov. 1805. 1 S. D. A. Ben. Rep. 113.

29. The heirs of a Mussulmaun deceased being a son and two daughters both married to the same person, the estate will be

divided into sixteen parts, of which the son will take eight, and each daughter four. The son dying, his sisters divide his share equally, so that each has eight parts of the original estate. The second daughter dies, leaving her husband and two sons ; the husband takes two parts, and the sons each three. The first daughter dies, leaving her husband and two nephews ; the husband takes four shares, and the nephews two each. One nephew dying, his father takes his share. Hence the division is : the husband $\frac{11}{16}$ of the estate, and the nephew $\frac{5}{16}$. 4th Sep. 1807. 1 S. D. A. Ben. Rep. 214.

NOTE.—It must be borne in mind that a Mussulmaun cannot marry two sisters at the same time, but he may marry the sister of his deceased or divorced wife. Vide Case X. Prec. Mar. and Note.

30. The heirs of a Mussulmaun being a widow, a sister with one son, and another sister with two sons, the estate will be divided into sixteen parts, of which one-fourth or four, will go to the widow, and the remainder equally to the two sisters, viz. six shares each. On the death of the sisters, the share of the first would go to her only son ; that of the second to her two sons in equal shares. Had the sisters died in the life time of the proprietor, his wife would have taken her four shares, and the three nephews equal shares in the residue, that is four each. 8th Aug. 1808. 1 S. D. A. Ben. Rep. 250.

31. The heirs of a Mussulmaun deceased being a widow, a son, a nephew (son of a half brother) and the widow's mother, the estate will be divided into twenty-four parts; of which the widow takes one-eighth, or three; and the son the remaining twenty-one parts. But on the death of the son, his mother, the widow, takes one-third of his twenty-one parts, or seven parts, and his half cousin the remaining fourteen ; and on the widow's death her mother takes her share. Hence the nephew has $\frac{14}{24}$, and the widow's mother $\frac{10}{24}$. 7th August 1809. 1 S. D. A. Ben. Rep. 284.

32. The share of the widow of a Mussulmaun, where there are no children or other descendants is one-fourth of her husband's estate; but it being ruled by Futwas that there is in modern times no *Bait-ul-mal,* or public treasury, regularly established, the other three-fourths also revert to the widow. 11th Sept. 1811. 1 S. D. A. Ben. Rep. 346.

33. Where there is but one child of a marriage, or any larger number, the widow is entitled to one-eighth of her husband's property at his death. Anon. 4th Term 1813. East's Notes, Case 1. Sup. Ct. Cal.

34. A female dying, and leaving a brother and sister, the brother takes two-thirds and the sister one-third of her ancestral property. 3rd May 1816. 2 S. D. A. Ben. Rep. 180.

35. In collateral descent, children of the brothers of a deceased Mussulmaun will take two-thirds, and the children of his sister one-third of the estate, if such brothers and sisters survive him. 15th Feb. 1820. East's Notes, Case 113. Sup. Ct. C.

36. But if a Mussulmaun die leaving the son of a brother and the son of a sister, their parents having died in his life time, the son of the brother will take the whole property. Ib.

37. The heirs of a deceased Mahomedan being his mother, his widow and the son of his paternal uncle, the estate will be divided into twelve shares, of which the mother will take four, the widow three and the son of the uncle five. Ib.

38. The claimants to a Mussulmaun's property being three widows three daughters, a mother, and a brother, the property should be made into seventy-two, or two hundred and sixteen parts; of which the widows should get nine, or twenty-seven; the daughters forty-eight, or one hundred and forty-four; the mother twelve or thirty-six; and the brother three or nine; and one of the daughters dying before the distribution, her mother takes one-sixth of her share, or eight; two-thirds or thirty-two are equally divided between her sisters, who each get sixteen, and the residue goes to the father's brother, her uncle. Hence the division will be; mother $\frac{36}{216}$; first wife $\frac{17}{216}$; second and third wives each $\frac{9}{216}$; two surviving daughters each $\frac{64}{216}$, and brother $\frac{17}{216}$. 4th Aug. 1820. 3 S. D. A. Ben. Rep. 46.

39. The preceding decision was according to the Suniy doctrine; but in a later case between the same parties, in which the uncle claimed his brother's share of a *Zemindari*, it was settled, that the parties being of the Shia sect, the law must be taken as received by that sect, and the brother (the uncle) was consequently held to be excluded by co-existing daughters; but what would be the legal distribution of his brother's estate was not settled. 12th Aug. 1822. 3 S. D. A. Ben. Rep. 164.

40. And in another case between the same parties it was decided, that though in the distribution of heritage both the Suniy and Shia sects recognize the same *Faraiz* or specific shares, they differ as to the distribution of the *Radd* or residue, should there be any. The Shias prefer the nearest kin who divide it in proportion to their specific shares. The Suniys,

on the contrary, give preference to the *Asbah*, or agnate kinsmen. 18th May 1830. 5 S. D. A. Ben. Rep. 29.

. This decision was confirmed on appeal by the Judicial Committee of the Privy Council. 24th Feb. 1841. 2 Moore's Ind. App. 441.

42. The heirs of a Mussulmaun being his widow and three daughters, the estate should be made into twenty-four parts, of which the widow takes an eighth or three; and the three daughters seven each. 11th Dec. 1820. 3 S. D. A. Ben. Rep. 58.

43. The heirs of a Mussulmaun, being his widow, two sons, and four daughters, the estate should be made into sixty-four parts, of which the widow is entitled to eight, the sons to fourteen each, and the daughters to seven each; and being his mother, his widow, and three sisters, should be made into thirty-nine parts, of which his widow is entitled to nine, his mother to six and his sisters to eight each. 11th Dec. 1820. 3 S. D. A. Ben. Rep. 59.

NOTE.—In this case, although the *Futwa* of the law officer of the Zillah Court was so far correct that it did not operate unjustly in respect to any of the heirs, yet as it did not appear that any distribution of the property had taken place until after the death of one of the heirs entitled to share in the estate, the *Futwa* ought to have been delivered according to the rules prescribed in a case of vested inheritance. This observation was made by the law officers of the Sudder Dewanny Adawlut; but as it appeared that by this mode of calculation, the result would be in substance the same, no further notice was taken of the omission. Macnaghten. For the rules to be observed in cases of vested Inheritance, when a person dies and leaves heirs, some of whom die prior to any distribution of the estate, see Macn. Prinl. 27, 28. Baillie Inh. 121. Morley.

44. The heirs of a Mussulmaun being two widows, a mother, and a son, the estate should be made into forty-eight parts, of which the widows are entitled to one-eighth, or six, taking three each; the mother to one-sixth or eight, and the son to the remaining thirty-four shares. One widow, and the mother dying, the son takes their shares. Hence he will have forty-five shares out of forty-eight. 15th April 1822. 3 S. D. A. Ben. Rep. 152.

45. The heirs of a Mahomedan being a widow, a mother, and a half sister, the property should be made into thirteen parts, of which three belong to the widow, four to the mother, and six to the half sister. 5th Feb. 1823. 3 S. D. A. Ben. Rep. 210.

46. The heirs of a Mussulmaun being his mother, his brother, and his widow, the property should be made into twelve parts, of which four should go to the mother; five to the brother; and

three to the widow; and on the mother's death her shares go exclusively to her surviving son. 15th Jan. 1824. 3 S. D. A. Ben. Rep 295.

NOTE.—The legal share of a mother where there are no children, nor son's children, and only one brother or sister, is one-third; and of a widow, where there are no children, nor son's children, one-fourth. And where a fourth and third share come together, the property should, in the first instance, be made into twelve shares. The brother takes what remains as residuary, after the legal shares have been satisfied. Macn.

47. A, the son of a daughter's daughter of a woman who died in the lifetime of her husband (who left no other heir but B an only son), was decreed to be entitled to one-half share of his maternal great grandfather's estate, B taking the other. 14th March 1825. 4 S. D. A. Ben. Rep. 32.

48. It was held, that the heirs of a Mahomedan deceased being a widow, a son, four daughters, and three sons of a deceased son, the property will be made into one hundred and ninety-two shares, of which the widow will take twenty-four, the son forty-two, each of the daughters twenty-one, and each of the grandsons fourteen. 30th April 1827. 4 S. D. A. Ben. Rep. 231.

49. The heirs of a deceased Mussulmaun being a son and daughter, the property will be divided into three shares, of which the son will get two, and the daughter one. 14th July 1827. 4 S. D. A. Ben Rep. 247.

50. A sister with an only brother, is entitled, at her father's death to a third of his property; and on the death of her brother, without being married, to his entire share of the property; to half of it as her specific portion, and to the other half by return or *Radd*. Ib.

51. When the heirs of a Mussulmaun deceased are a widow, a son, and two daughters, the property should be divided into thirty-two parts, of which the widow is entitled to four, the son to fourteen, and the daughters to seven each. 29th Nov. 1827. 4 S. D. A. Ben. Rep. 280.

52. Held, that a person who was descended from the great grandfather of a deceased Mussulmaun was entitled to a share of the residue. 2nd Term 1831. Baillie Inh. 82. Sup. Ct. Cal.

53. In the succession to, or partition of an estate, the shares of a father, mother, and spouse, are respectively one-third, one-sixth, and one-half. 24th April 1833. 5 S. D. A. Ben. Rep. 296.

54. The heirs of a deceased Mussulmaun being two widows, three sons, and four daughters, his property will be divided into eighty shares, of which the widows will take ten between them, the sons fourteen, and the daughters seven each. 25th April 1837. 6 S. D. A. Ben. Rep. 159.

55. The heirs of a Mussulmaun deceased being two widows, a mother, and three daughters, one by the first wife, and two by the second, the estate will be divided into two hundred and forty, or twelve hundred parts, of which the widows will receive fifteen, or seventy-five each, the mother forty-two, or two hundred and ten, and the daughters fifty-six, or two hundred and eighty each. 28th Dec. 1841. 7 S. D. A. Ben. Rep. 62.

56. But one of the daughters of the second wife dying before the distribution of the estate, leaving as her heirs her mother, her uterine sister, and her half sister, her share $\frac{280}{1200}$ is thus divided. The second wife her mother, takes one-fifth, or fifty-six; the half sister one-fifth or fifty-six; and the uterine sister three-fifths, or one hundred and sixty-eight. Hence the division of the entire property will be; the first wife $\frac{75}{1200}$; the second wife $\frac{131}{1200}$; the mother $\frac{210}{1200}$; the half sister $\frac{336}{1200}$; and the uterine sister $\frac{448}{1200}$. Ib.

57. When there is only one sister by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take one-sixth as their legal shares. 23rd Feb. 1848. S. D. A. Dec. Ben. 106.

58. Of two widows, on whom their husband had settled his property in equal proportions, one dying, the other has no right of inheritance, but the deceased widows' sister's son, will take the property in default of nearer heirs. 19th May 1821. 3 S. D. A. Ben. Rep. 90.

59. Two sons of a deceased Mussulmaun in Malabar brought a suit against their late father's nephew to recover possession of certain paddy fields and outstanding debts, the property of their late father. The nephew claimed to succeed as heir to his uncle's estate in conformity with certain local usages of Malabar, observed chiefly by the Hindus there; but failing to prove that such custom prevailed in the family, the estate was adjudged to the sons according to the Mahomedan law of Inheritance. Anon. Case 5 of 1809. 1 Mad. Dec. 29.

60. An illegitimate son of a Mahomedan, who during his life time, had held a share of an office which was *Watan*, or hereditary, has no claim to such share on the decease of his father where the custom of the country does not allow bastards to succeed

to hereditary offices; and although the Mahomedan law recognizes no *Watan* property, but classes all property under the term *Tarikat* or "effects," and by that law an illegitimate son would therefore inherit and succeed to the office; yet under Sec. 14 of Reg. II. of 1800,* which directs the customary rule of the country to operate, under certain circumstances, to the exclusion of the written law, such claim cannot be admitted, where the custom of the country differs from the law. 21st Feb. 1821. 2 Borr. 33. S. A. Bom.

61. The family usage, that a *Zamindari* had never been separated, but had devolved entire on every succession, though proved to have existed as the custom for many generations, will not exempt the *Zamindari* from the operation of Regulation XI. of 1793, which provides, in case of intestacy, for the division of the landed estate among the heirs of the deceased. 12th August 1822. 3 S. D. A. Ben. Rep. 164.

62. This decision was confirmed, on appeal, by the Judicial Committee of the Privy Council. 24th Feb. 1841. 2 Moore's Ind. App. 441.

63. Reg. X. of 1800, does not apply generally to all undivided *Zamindaries*, in which a custom prevails that the inheritance should be indivisible, but only to the jungle Mahàlls, of Midnapore and other districts, where local customs prevail; and therefore only partially, and to that extent, repeals Reg. XI. of 1793. In a suit therefore, by a party in possession of one moiety of a *Zamindari*, for recovery of the other, on the ground that the estate was according to the family rule, indivisible, it was held by the Judicial Committee of the Privy Council, that the property not being a jungle Mahàll, within the provisions of Reg. X. of 1800, the family rule, if proved, was abrogated by Reg. XI. of 1793, and (the title deeds set up in the pleadings not being satisfactorily proved) that the descent must be governed according to Reg. IV. of 1793, by the law of the religious sect to which the disputants belonged: The Judicial Committee, in affirming the judgment of the Court below, held the *Zamindari* divisible among the co-heirs of the deceased *Zamindar*, according to the laws of the Shia or Imamiyah sect to which they belonged. Ib.

64. A Court of Law is not justified in disturbing a mode of succession to which long prescription has lent its sanction. 20th May 1850. 5 Dec. N. W. P. 69.

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* Rescinded by Reg. I. of 1827. Morley.

65. And where it appeared that a certain Maafi village had been held for a long period, under a grant from the Maharajah of Gwalior, by the original grantee and his lineal descendants, who were the Pirmurshids to the Maharajah, rather as a religious endowment, in which the grantee's descendants acted in turn as Superintendents, than as a personal one; that on the death of the grantee, leaving male and female offspring, the ordinary rules of inheritance were set aside in favor of one son to the exclusion of the co-heirs; that the grant had not at any period been subjected to division; and that on failure of the direct line the defendant (a descendant of the original grantee in a collateral line) had been sent for and installed in due form, as Gaddi Nashen, by the Gwalior Durbar; it was held, that a claim for a share of the estate by the Plaintiff, as the principal heir of her son, who was the last incumbent, could not be maintained, although there was no proof whether any endowment was originally constituted, so as *primâ facie*, to bar division of the estate amongst the heirs of the original grantee, according to the rules of Mahomedan law. Ib.

66. Where a Mussulmaun claimed the *Sajjadeh Nishini*, or right of superintendence of a religious establishment, together with the *Tawliyat*, or trusteeship and management of certain rent free lands attached to it, he being a lineal deseendant of the original founder, as required by the original assignment, judgment was given in his favor against one claimant, who was descended from the founder by the intervention of females, and another (a woman), who was prevented by her sex from holding the offices, under the provisions of the grant, but with a reservation for his obtaining a sunnud from Government. 17th Sept. 1805. 1 S. D. A. Ben. Rep. 106.

NOTE.—The decision in this case was governed by the special conditions of the endowment, no less than by the general law respecting pious appropriations. The offices of principal of the institution, and of trustee and manager of the lands, had been reserved by the original assignment for a lineal descendant of the founder. According to the prevailing authorities of Mahomedan law, lineal descent intends the male line; and a female descendant in the male line is disqualified by sex for one of the offices. It became therefore necessary to select a person from the male descendants of the founder; and the trust being of a public nature, it appeared proper that the nomination of the person to be appointed should have the sanction of Government. Macn. Morley.

67. Homicide, whether punishable by retaliation or expiable is an impediment to succession to the estate of the person slain. 12th Oct. 1803. 1 S. D. A. Ben. Rep. 73.

NOTE 1.—Vide 3 Macn. Prin. 31. Baillie Inh. 21.

NOTE 2.—Amomg Shiahs, homicide, whether justifiable or accidental, does not operate to exclude from the inheritance. The homicide to disqualify, must have been of malice prepense. Macn. Prin. 49 par 6. Morley.

68. A person obtaining a grant in the name of another, with the intention of holding the property during his life, and securing the succession of the nominal grantee at his death, cannot thereby defeat the right of inheritance of his lawful heirs, who is entitled at his death to succeed to the property of which he died possessed as part of his estate. 8th Aug. 1808. 1 S. D. A. Ben. Rep. 250.

69. Apostacy from the Mahomedan faith, if subsequent to the devolution of heritable property, does not deprive the apostate of his right of succession. 30th Dec. 1808. 1 S. D. A. Ben. Rep. 268.

70. A natural son of a Mahomedan woman, by a Christian, if brought up in the profession of the Christian religion, cannot of right inherit her property. In the goods of Beebee Hay. 3 [illegible] Term 1819. East's Notes Case 105. Sup. Ct. Cal.

71. The child of a Mahomedan dying in his father's life time is not entitled to inherit. 15th Feb. 1820. East's Notes, Case 113. Sup. Ct. Cal.

72. A Mussulmaun cannot inherit with his paternal uncle if his father died before his father's father; in other words, there is no right of representation recognized in the Mahomedan law. 17th Aug. 1824. 3 S. D. A. Ben. Rep. 403.

73. When the original ancestor of the parties had been deprived by the then existing Government of estates, which were recovered under another Government by the descendants of one of his sons, it was held, that the descendants of another son have no right to participate. Ib.

74. A renunciation of inheritance during the life time of the ancestor was decided to be null and void; and it was held that a claim to such inheritance renounced might be preferred at any subsequent period without limitation. 13th Feb. 1827. 4 S. D. A. Ben. Rep. 210.

75. Held, that *Altamghá* lands are inheritable property, and ordered that they should be divided among the heirs of the original proprietor, their opponents claiming under a deed of gift alleged to have been executed in their favor by a person on whom the the Patna Provincial Council had made a grant of the *Altamghá* lands *de novo*, and in whose favor a decree to hold them had been passed by the same authority; it ap-

pearing that the Persian decree (which the Sudder Dewanny Adawlut considered themselves bound to follow) awarded to the donor possession as manager only for the ancestor, and as no grant for lands whose produce exceeded 1,000 Rs. per annum could be valid without the sanction of the Supreme Council, which had not been obtained in this instance. 13th January 1823. 3 S. D. A. Ben. Rep. 179.

NOTE 1.—*Altamghá* grants are made for personal purposes. To such an estate, on the death of the grantee, the sharers and residuaries succeed to their legal portions according to the law of inheritance. Macn. Prin. 329, Case 3.

NOTE 2.—The above suit originated in the celebrated Patna Case, which was instituted in the year 1777, an account of which may be seen in Mill's History of British India, Vol. 2, p. 569, 4to. Edition. Macn.

76. A claim to inheritance may be preferred at any time subsequent to the death of the ancestor without limitation. 13th Feb. 1827. Leycester and Dorin of the S. D. A. in the case of Khanum Jan *versus* Jan Beebee.

77. A. the widow of B. a Mussulmaun, repelled the action of C. his brother, for a share of an ancestral estate, by pleading the result of an action by their father whereby his claim to a share therein had been dismissed. Plea overruled, the father's heritable right having been recognized in a subsequent scheme of distribution amongst the co-heirs, and B. and C. as such, having by joint payment, saved the estate from sale for arrears of public revenue, thereby acquiring the interest of other co-sharers who abandoned. 5th April 1832. 5 S. D. A. Ben. Rep. 184.

78. A, a Mahomedan female, having succeeded to certain estates inherited from her mother, died, leaving her husband the appellant, and two daughters, the respondents surviving her. Held by the Privy Council (in affirmation of the judgment of the Courts in India) that the daughters, respondents, were entitled by the Mahomedan law, as coparceners, to three-fourths of the estates, and the father, the appellant, to the remaining fourth. Held further, that the effect of an order of the Foujdary Court, giving possession of real estate, is merely to prevent the occupation being disturbed by violence, and confers no right or title on the party put in possession. 21st June 1853. Moore's Ind. App. Cases V. 413.

79. Heirs are answerable for the debts of their ancestors to the extent of the estate they inherit. After liquidation of such debts, the personal judgment creditors of the heirs are entitled to satisfaction of their claims from the residue as well as from

the acquired property of the heirs. Sheik Kasim Ally. Petr. 5th July 1851. Case 34. Sev. Rep. S. D. A. Ben. III. 141.

80. The widows of a deceased shareholder of a service Wutun, who claimed the whole of his share as their inheritance, allowed only a fourth of it according to Mahomedan law. The Principal Sudder Ameen was of opinion that females are not entitled to share in lands and emoluments of service grants. But this opinion was over-ruled both by the Zillah Judge and Sudder Dewanny Adawlut. 23rd June 1855. Morris' Cases, S. D. A. Bom. 147.

81. The following question being proposed to the law officer "Suppose the deceased woman to be of the *Sheea* sect; and her uncle a *Soonee*, her mother and husband being of the *Sheea* sect, what devolution of her property takes place. Does it descend according to the religion professed by her uncle, or that of herself, her mother and husband?" the reply was as follows—"The division of the property of a deceased woman of the *Soonee* religion will take place according to the rules laid down for inheritance by *Soonees*; that of the property of a deceased woman of the *Sheea* religion, to that laid down for inheritance by *Sheeas*." Decision accordingly. 11th Dec. 1850. V. Dec. S. D. A. N. W. P. 417.

82. Held, that, it is shown by the numerous *futwas* filed in the case that the Begum, as a *Soonnee* is entitled to the benefit of the law of her own sect, and were there any doubt on the subject, the Court would not hesitate to recognize the *Soonnee* law of inheritance, being that of the defendant, on the principle recognized in Clause 2, Section 6. Regulation V. of 1831. 8th Sep. 1851. Dec. S. D. A. N. W. P. VI. 350.

NOTE.—The Plaintiffs appear to have been *Sheeas*.

83. From the *futwa* obtained from the law officer of the Sudder Court, it appeared that a wife does not, by an act of disobedience to her husband, forfeit her right of inheritance. 28th May 1855. Dec. S. D. A. N. W. P. 252.

84. A widow (a Soonnee) who is of a religion different from that of her husband (a Sheea), is entitled to no share in his landed estate. Ib.

85. The term Soofee is a denomination applied to a sect who affect a greater degree of strictness in matters of religion, but the distinction is productive of no alteration in the general law of inheritance. Ib.

86. There is no distinction between ancestral and acquired property in the Mahomedan law of Inheritance (Vide Prin. and Prec. p. 1). Ib.

87. Held, disinheritance by the father cannot affect a claim in right of succession to the mother. 16th July 1857. Dec. S. D. A. Ben. 1257.

88. According to Mahomedan law, the mother of a deceased woman, and the husband, (there being no other heirs), are entitled to share equally the dower of the deceased. 25th March 1858. Dec. S. D. A. Ben. 501.

89. In a case wherein the heirs of a Mahomedan who succeeded to his property, fraudulently pleaded renunciation of inheritance, in order to baffle their father's creditors, it was decided, that, the ordinary rule of Mahomedan law is, that "heirs are answerable for the debts of their ancestors as far (only) as there are assets." Numerous passages in *Macnaghten's Precedents of Mahomedan Law*, however, show that it is the duty of the heirs, on the decease of the ancestor, to marshal his effects and to provide for the payment of his debts before they appropriate any portion of the inheritance. The general principle is thus laid down in Sec. 5, Chap. I. of Macnaghten's work: "Debts are claimable before legacies, and legacies (which however cannot exceed one-third of the testator's estate) must be paid before the inheritance is distributed."

In Case LIX, page 128, this principle is thus expounded: "On the death of the proprietor, his estate, whether real or personal, should, in the first instance, be applied to defray his funeral expenses; in the second place, to the discharge of his debts; and, in the third place, to the payment of his legacies out of a third of the residue of his property. What remains should be divided." And in Case VIII, page 88, we have a similar exposition: "If the debtor left property at his death, the creditor may claim his debt from the heir of the deceased, who has become possessed of the property left, and the debts of a deceased person must be liquidated before claims of inheritance can be satisfied. If the amount of the property exceed the amount of the debts, the heirs will share the residue; but if the property fall short of the amount of the debts, the whole of it must be appropriated to their liquidation."

In appropriating the inheritance and distributing it, without providing for the payment of their father's debts, there is no doubt therefore, that the heirs have placed themselves in the position of wrong-doers. They have violated that rule of the Mahome-

dan law, *which seems to have been expressly intended for the protection of creditors against the risks to which they would otherwise have been exposed, from the practice of confining the liability of heirs to the amount of assets they have received.* Not only have they done this, but they have set up a fraudulent plea of renunciation of inheritance, with a view of still further baffling the creditor *with whom it was their duty to have settled on their father's death.** They have intermeddled illegally with assets which ought to have been devoted to the payment of their father's debts and must take the consequences: the heir of a Mahomedan has his duties as well as his privileges, and cannot be allowed to claim the one without fulfilling the other. The creditor may proceed against any property of these parties that he thinks fit, whether personal or otherwise; but having regard to the general principles of the *Mahomedan Law of Inheritance,* which do not award to a creditor anything beyond the assets of his deceased debtor, the heirs shall be at liberty to prove, that property attached was neither asset of their father nor acquired with funds derived from him. 30th April 1859. Dec. S. D. A. Ben. 539.

NOTE.—The above decision contains a summary of the law relative to the liability of Mahomedan heirs for debts and might with advantage be incorporated with Circular Order No. 73 of the Madras Sudr Court, relative to the liability of Hindoo heirs, at least, so far as to declare Hindoos who succeed to an inheritance, *bound* to satisfy debts *before entering on possession, under penalty, in the event of default, of incurring personal liability.* The want of such a rule frequently leads to most unsatisfactory investigations, when a dispute occurs after a lapse of time. Vide on this subject page 25 of Colebrooke's Obligations and Contracts.

INTEREST.

NOTE.—The Mahomedan Law prohibits the taking of interest for the use of money upon loans from one Mussulmaun to another, and has not regulated the rate of it when allowed to be taken from a hostile infidel. 2 Hed. 489 et seq. 551 et seq. Morley.

1. A, a Mussulmaun, sues B for possession of a village under a deed of mortgage and conditional sale for Rs. 2,081, redeemable in five years. It appearing that A lent B, Rs. 1,300 only, and, to avoid the imputation of taking interest (which is forbidden by the Mahomedan religion), consolidated the interest on that sum for five years with the principal, and caused the aggregate sum to be entered in the bond as principal; it was

* NOTE.—The Court did not consider that the heirs were in a position to claim exemption from a *personal decree.*

held that he is not, under such a deed, entitled to possession of the village at the expiration of the period of redemption. The Court, however, ordered that he should recover the principal sum actually lent, with interest thereon, as there was no attempt to obtain usurious interest beyond the legal rate of 12 per cent. 16th March 1818. 2 S. D. A. Ben. Rep. 255.

2. A Mussulmaun Manager of a joint estate is liable to account for all the profits and interest which he may make by the estate come to his hands, excepting only for interest unlawfully taken by him from Mussulmauns for the loan of money to them. 24th July 1817. East's Notes. Sup. Ct. Cal.

NOTE.—But the Moulavi said that he would be bound to account for such illegal interest even, should the joint cestui que trusts require it. By the Mahomedan Law a Mussulmaun taking interest from a Mussulmaun is punishable, and the Kazi would cause the money to be returned to the giver of interest or to his heir; or if none existed the Kazi would retain it and give it away in charity. Morley.

3. In a case wherein the Lower Courts disallowed interest the Sudder Dewanny Adawlut observed in special appeal, that "the reason assigned by the Moonsiff for withholding interest from the plaintiff (and which the Judge accepts as sufficient) is, that it is opposed to the spirit of the Mahomedan law both parties being Mussulmauns." The plaintiff in his appeal to the Judge represented that, as interest was stipulated in his bond, it was contrary to justice not to allow it, and this Court fully recognizes the reasonableness of this plea. The Moonsiff was in no way bound by the Mahomedan law in adjudicating this matter, as the suit did not relate to the inheritance of or succession to landed property (Vide Cl. 2 Sec. 6. Reg. V. of 1831), in which cases alone the regulations require that his proceedings should be strictly regulated by the peculiar law of the litigant parties. The Moonsiff ought to have disposed of this case agreeably to the established practice of the *Mofussil* Courts which allows interest where such is fairly demandable, without reference to the peculiar doctrine of the Mahomedan law. 16th March 1852. Dec. S. D. A. N. W. P. VII. 88.

NOTE.—The above principle has been recognized by all the Courts, but the question is not likely to arise in future since Act XXVIII. of 1855 has repealed the usury laws. Other decisions are therefore omitted.

JURISDICTION.

Vide ACTION 10.
MAINTENANCE 3.

KAZI.

1. Held, that a civil suit for damages is the only means by which a Kazi under Reg. III. of 1808, can exclude others from performing the duties of his office. Pro. Fouj. A. 27th April 1837. Camp. Madras Regulatious, p. 189.

2. Held by the Sudder Dewanny Adawlut, on a summary application, that it is not competent to a *Zamindar* to collect fees appertaining to the office of *Kazi.* The question of right however, was still left open to a regular suit should the Zemindar think proper to try it. 15th Jany. 1841. S. D. A. Ben. Sum. Cases 1.

3. A Kazi having sued for recovery of fees received by defendants for performance of certain marriages, the Moofty Sudder Ameen decided in his favor, but although the Civil Judge affirmed the decision he disallowed the amount of fees awarded. On special appeal the suit was remanded because the Civil Judge was bound to award the special appellant's fees at some rate such as might appear equitable, and not to refuse him emoluments altogether because of difficulty in estimating the rate at which they should be allowed. 17th March 1856. Dec. Mad. S. D. A. 39.

NOTE.—This decision appears to uphold the principle that a Kazi is at liberty to sue for recovery of fees received by a party for the performance of a marriage which by the nature of his office should be performed by the Kazi himself, or his duly constituted Naib.

4. A Pergunneh Cauzie having been interdicted by a Judge from attesting deeds, appealed to the Sudr Dewanny Adawlut, setting forth, that, by immemorial custom *Cauzies* do not exact any fee, excepting such as the parties concerned may voluntarily agree to pay for duties performed as has hitherto been the practice, when engaged in drawing up or attesting papers, &c. The Court held, that Cauzies are appointed for the preparation and attestation of deeds of transfer and other law papers, &c. as of old under the Mahomedan Government (See Sec. I. Reg. XXXIX. of 1793): and Circular Order of July 25th, 1851, was issued to explain that duty; and to declare it to be distinct from REGISTRATION, as established under the regulation of the Company's Government. The order of the Judge restricting the Cauzies' duties to the attestation of *Wakultnamahs* and *Mooktarnamehs* is illegal and is reversed. 20th Dec. 1855. Case 197. Dick, J. Sev. Rep. S. D. A. Ben. III. 827.

NOTE 1.—The Circular Order referred to is as follows :—The Court of Sudder Dewanny Adawlut having reason to believe that doubts exist as to the

sufficiency or otherwise of an attestation by a Kazi to meet the exigency of Acts XIX. of 1843 and IV. of 1845, and to answer all the purposes of registration under those Acts, direct me to inform you that such an attestation is not the registration contemplated by those Acts, which refer exclusively to registrations effected by registers appointed under Reg. XXXVI. of 1793, Reg. IV. of 1824 and Sec. 4, Reg. VII. of 1832, and Act XXX. of 1838.

2.—The Court observe that Reg. XXXIX. of 1793, which defines the duties of Kazies, provides only for the preparation and attestation, and *not* for the registration of deeds by those functionaries, and that the Circular Order No. 21, Vol. III. dated the 28th Sept 1838, was issued rather with reference to what was believed to be the existing practice, than to the terms of the law. In order, however, to obviate all doubts upon the subject, the Court are pleased to rescind the Circular, and to substitute the following rule in its stead.

3.—With a view to the better attainments of the objects of the preparation and attestation of deeds by the *Pergunneh Cauzies*, the Court request that you will direct those Officers to enter copies of all deeds attested by them in books, to be *furnished* to them by you, paged throughout and attested by your initials, and properly bound up, to forward to you monthly a list, drawn up in the annexed form, of the deeds so *attested*, and to forward the books themselves to your office when filled up, for the purpose of being deposited among your records, for preservation as well as future reference. Form omitted. Sev. S. D. A. Ben. Rep. III. 828.

5. The *Sudder Dewanny Adawlut* will not recognize a power of attorney attested only by the Cazee of a district as a sufficient authority for the payment of money out of the treasury of the Court. 4th Jan. 1859. Case 117. Sev. S. D. A. Ben. Rep. V. 509.

6. Fees for the performance of certain ceremonies cannot be exacted by a Cazee, and the payment of any remuneration for the official duties must be voluntary. 6th June 1853. Dec. S. D. A. Ben. 508.

7. But in a suit wherein plaintiff sued on a *Kistbundee*, claiming from defendants a sum which they agreed to pay him annually as his Naib Cazees, who were to receive fees from the ryots, held, that a person who enters into an engagement to collect such voluntary fees, and to pay a sum certain to a Cazee on being allowed to act as his Naib, in the collection, is legally bound by such engagement. Ib.

8. Held, that a Cauzee of a district is not authorized to sue for marriage fees, on the ground that the defendants had employed another party to read the Kalma at a marriage ceremony. 17th August 1859. Dec. S. D. A. Ben. 1126.

KHOTBAH.

1. Any Khatib in any village, or town, may perform prayers on Friday, and read the Khotbah in a Musjid, or house, or in any other place which may be selected by common consent; nor has the Khatib appointed by the Sultan, or his representative, any power whatever to hinder or forbid him from reading the Khotbah. Case 1 of 1814. 1 Mad. Dec. 82.

LAW.

1. The question whether a will has been properly executed by a Mahomedan testator must be tried by the English, and not the Mahomedan Law of Evidence. 19th January 1813. 2 Str. 180. Sup. Ct. Mad.

2. In an action of *assumpsit* by a Mahomedan Plaintiff, the Defendant (being a British subject) is entitled to the benefit of the British law. Circa 1826. Cl. R. 1834. 20 Morton 243. Sup. Ct. Cal.

3. Excepting in the case of Hindoos and Mahomedans, there is no other law than the British which can affect the descent of lands in Calcutta. Cl. Ad. R. 1829. 56 Sup. Ct. Cal.

4. The Supreme Court will administer English law between Hindoo or Mahomedan parties as between British subjects, except only in cases falling within the specific exceptions of the 21st Geo. III. c. 70, s. 18. 4th July 1839. Morton 107. Sup. Ct. Cal.

5. Dictum of Peel, C. J. A British subject has no privilege in this Court to have a special law applied to his case. The same law applies, and the law of Descent is one and the same, for all the suitors of this Court except Hindoos and Mahomedans. Feb. 1844. 1 Fulton 422. Sup. Ct. Cal.

NOTE.—It will be remarked that the practice on this point differs from that adopted by the Honorable Company's Court. This case may be considered as decisive. Morley.

6. In a suit brought by a Mahomedan against a Hindoo, the decision was grounded on the law of the religion of the defendant, as directed by Sec. 3* of Reg. VIII of 1795. 1st April 1818. 2 S. D. A. Ben. Rep. 257.

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* NOTE.—Rescinded by Reg. VII. of 1832 Ben. Code. Sec 9 of which, in regard to the case of parties differing in religion, has laid down the principle adopted. Morley Vol. I. Dig. p. 522.

7. In a suit in which both parties are Shias the Court will decide agreeably to the doctrines of that sect; and according to the law of inheritance prevailing among them a brother is entirely excluded by a daughter. 12th August 1822. 3 S. D. A. Ben. Rep. 164.

8. The Decision in appeal on the above. By Reg. IV. of 1793, (Ben. Code) it is provided that in suits relating to succession, inheritance, marriage and caste, and all religious usages and institutions, the Mahomedan law with respect to Mahomedans, and the Hindoo law with respect to Hindoos, are to be considered as the general rules by which Judges are to form their decision; according to the true construction of which the Mahomedan law of each sect ought to prevail as to the litigants of that sect, and not the general Suniy law. 24th Feby. 1841. 2 Moore's Ind. App. 441.

9. Where right of inheritance was the subject of a suit, and a question as to the validity of a contract under the Mahomedan law incidentally arose, the Court ascertained such law by reference to its Muftis. 24th April 1833. 5 S. D. A. Ben. Rep. 296.

10. Where the Plaintiff, a Mussulmaun claimed against a Hindu vendor and vendees of an aliquot part of an undivided estate, the right of pre-emption founded on common tenancy, it was ruled by the Court, on general principles of equity, that the legality should be tried with reference to the law of the defendant rather than that of the Plaintiff. The Register of the Sudder Dewanny Adawlut had before, when consulted, with reference to Sec. III. Reg. VIII. of 1795, enacted for Benares only, propounded this as a general rule, though liable to vary under particular circumstances. This was ruled before Reg. VII. of 1832, with which it is not at variance. 9th July 1833. 5 S. D. A. Ben. Rep. 299.

NOTE.—Vide Note to Case 6, and Note to Case 13.

11. Where a Moonsiff decided a case on a point of Mahomedan law, and the Principal Sudder Ameen reversed his decision on the ground that the law, as expounded by the Moonsiff was wrong, it was held, that before reversing the decision he should have called for a futwa from the law officer. 22nd Sept. 1848. 3 Dec. S. D. A. N. W. P. 367.

12. It is irregular to submit the entire record for the opinion of the law officer, as the question propounded ought be put hypothetically. 27th June 1850. S. D. A. Dec. Ben. 321.

NOTE.—This case was between Hindus.

13. In a claim for the right of pre-emption by the Plaintiff, a Mahomedan, the Defendants, being Hindus; it was held, that under Sec. 3 of Reg. VII. of 1832, the Mahomedan law could not be applied, the more especially since the Defendants (the Hindus) objected to the application of the Mahomedan law to themselves. 28th May 1849. 4 Dec. S. D. A. N. W. P. 137.

NOTE.—This ruling is not in accordance with numerous other decisions on the subject of pre-emption.

14. The house of A, a Hindu, adjoined the house of B, a Mahomedan. B having failed to induce A to let him have his house, sold his own, without A's knowledge or consent, to C, a Hindu, whereupon A brought a suit against B and C for possession of the house sold to C by right of pre-emption. The Judge decreed in favor of A. It was urged in special appeal that as A was a Hindu and B was a Mussulmaun, the case should not have been tried by the law of either party, but according to the principles of equity and good conscience, under Sec. 9 of Reg. VII. of 1832. Held, that the regulation did not apply, since it provides that "whenever the parties are of different persuasions, the laws of those religions shall not be permitted to operate so as to deprive such parties of any property to which, but for the operation of such laws, they would have been entitled;" and in the present case the only party who lost any thing was C, who was of the same persuasion as the Plaintiff. 28th January 1850. 5 Dec. S. D. A. N. W. P. 21.

15. No objection having been made to the application of the Mahomedan law of pre-emption, the Courts are not called upon *proprio motu* to refuse to administer such law to Hindus. Ib.

16. Still less in a case where the plaintiff is a Hindu, and the defendants a Hindu and a Mussulmaun respectively, can the Mahomedan defendant take an objection to the application of such law in special appeal. Ib.

17. The Courts are not competent, even on waiver by the parties, to dispense with an express requisition of the law. 27th Dec. 1849. S. D. A. Dec. Ben. 487.

NOTE.—This case was between Hindus, but the principle is generally applicable.

18. A futwa having been required from the Mahomedan law officer the concluding question and answer run thus, "suppose the deceased woman to be of the *Sheea* sect, and her uncle a *Soonee*, her mother and husband being of the *Sheea* sect, then what

devolution of her property takes place, does it descend according to the religion professed by her uncle, or that of herself, of her mother and husband?" Answer. "The division of the property of a deceased woman of the *Soonee* religion will take place according to the rules laid down for inheritance by *Soonees*; that of the property of a deceased woman of the *Sheea* religion, to that laid down for inheritance by *Sheeas.*" 11th Dec. 1850. Dec. S. D. A. N. W. P. V. 417.

19. Ruled that a *futwa* delivered on an assumption of facts in the questions propounded to the law officer, cannot be allowed any authority. 16th June 1851. Dec. S. D. A. N. W. P. VI. 215.

20. Held, that it is shown by the numerous *futwas* filed in the case, that the Begum as a *Soonnee* is entitled to the benefit of the law of her own sect, and were there any doubt on the subject, the Court would not hesitate to recognize the *Soonnee* law of inheritance, being that of the Defendant, on the principle recognized in Cl. 2. Sec. 6. Reg. V. of 1831. 8th Sept. 1851. Dec. S. D. A. N. W. P. VI. 350.

NOTE.—The Plaintiff appear to have been Sheeas.

21. Objection relative to the validity of a marriage, in consequence of one party being a *Sheea* and the other a *Soonneh*, over-ruled. 8th Sept. 1851. Dec. S. D. A. N. W. P. VI. 350.

22. A point not involving a question of law, but one of simple fact cannot be referred to the law officers for exposition. 11th Sept. 1857. Dec. S. D. A. N. W. P. VI. 368.

23. When a question of law is at issue it is the duty of a Judge, to call for a *futwa* from the constituted Mahomedan law officer, previous to disposing of a case. 7th June 1852. Dec. S. D. A. N. W. P. VII. 231.

24. A futwa furnished by an unknown individual and not by the constituted law officer of a Court is valueless. 6th Oct. 1852. Dec. S. D. A. N. W. P. VII. 509.

25. A Principal Suder Ameen (though himself a Mussulmaun) was held not competent to determine a question of law without reference to the Mahomedan law officer. 31st Jan. 1854. Dec. S. D. A. N. W. P. IX. 68.

LIMITATION OF ACTIONS.

NOTE.—Act No. XIV. of 1859 amends and consolidates the law relating to the limitation of suits and provides,

1st. That suits for pre-emption shall be instituted within one year from the time at which the purchaser shall have taken possession under the sale impeached. Sec. 1.

2nd. Suits for damages for injury to the person and personal property or to the reputation; for wages and bills for board and lodging within one year. Sec. 2.

3rd. Suits for the hire of animals, vehicles, boats, household furniture, bills for articles if sold by retail, rents for lands or buildings within 3 years. Sec. 8.

4th. Suits for money lent on interest or for breach of contract within 3 years. Sec. 9.

5th. Suits for Debts, obligations of record and specialties, and legacies within 12 years. Sec. 11.

6th. Twelve years is the period limited for recovery of immoveable property and interest in immoveable property as well as for maintenance chargeable on such property. Secs. 12 and 13.

7th. Suits for deposits, pawns, and mortgages, may be instituted within 30 and 60 years. Sec. 15.

8th. Other suits not expressly provided for 6 years from cause of action. Sec. 16.

For further particulars the reader is referred to the Act itself.

1. A claim to inheritance may be preferred at any time subsequent to the death of the ancestor without limitation. Mt. Khanum Jan. *v.* Mt. Jan. Beebee. 13th February 1827. Leycester and Dorin of the S. D. A.

2. A claim by a Mussulmaun woman to a share of her deceased father's property was dismissed as not having been preferred for more than twelve years after his death, and therefore not cognizable under Sec. 14 Reg. III. of 1793, and Cl. 3, Sec. 2, Reg. II. of 1805. 9th May 1820. 3 S. D. A. Ben. Rep. 32.

3. A suit instituted in 1817, to recover *Altamgha* lands, in right of an ancestor, who died out of possession of them, in 1798, was held to be barred by the Bengal Statutes of Limitation Reg. III. of 1793, and Reg. II. of 1805. 3rd Jan. 1834. 2 Knapp, 225. Privy Council.

4. The Lower Courts having decided a suit, declaring a deed to be invalid under the Mahomedan law, the Sudder Dewanny Adawlut, in special appeal, would not go into the question of the validity or otherwise of the deed, but reversed the decision of the Lower Courts on proof of uninterrupted possession for a period of fifteen years, the neglect in not having instituted the action not being accounted for. 1st March 1836. 6 S. D. A. Ben. Rep. 58.

5. Plaintiff's sued for the share of the estate of a deceased Mahomedan, under the law of inheritance, and obtained a decree in the Zillah and Provincial Courts against the Defendants, who pleaded in bar to the action a conveyance under a special assignment. The Sudder Dewanny Adawlut reversed the

decrees of the Lower Courts, and dismissed the claim on the long adverse possession of the Defendants and their ancestor. 30th June 1836. 6 S. D. A. Ben. Rep. 74.

6. When claims to the entire estate of a deceased Mahomedan had been set up by his widow and brother, neither of which appeared to be well founded; it was held that the period of limitation for the institution of an action by his heirs at law should be calculated from the date of his death, and not from the date of the decree between his widow, and brother. 22nd April 1843. 7 S. D. A. Rep. 124.

7. A Mahomedan of the *Shiah sect*, by a deed of dower charged his whole estate with a certain sum when *demanded by his wedded wife*. Held, that a demand during the life time of the husband was not necessary, and that, although more than twelve years had elapsed from the date of the deed, and the time the widow set up her claim for dower, she was not affected by the provisions of Ben. Reg. III. of 1793, Sec. XIV, and that the limitation there provided for, formed no bar to her claim. 20th July 1855. Moore's Ind. App. VI. 211.

8. A suit for recovery of a Mosque 38 years after it had been converted into a private dwelling held barred. 1st April 1851. Dec. S. D. A. N. W. P. VI. 95.

9. Held, that a suit for ground was barred where it did not appear that it had not been made use of, by the Mahomedan population, for religious purposes for the period of twelve years preceding the institution of action. 22nd Sept. 1853. Dec. S. D. A. N. W. P. VIII. 679.

10. With respect to the law of limitation in cases of pre-emption vide 43 Tit. Pre. which contains a clear exposition of the applicability of the regulation law, in supersession of the Mahomedan as explained by Macnaghten.

11. A plaintiff who had for eighteen years held a portion of certain lands, though termed *Wuqf*, as privately heritable and divisible lands, other portions being similarly held by other parties, coheirs, with the plaintiff of the last occupiers, was not allowed to bring a suit for exclusive possession of the whole lands, as *Mootuwullee*, upon tender of proof of their being *Wuqf*. 21st April 1853. Dec. S. D. A. Ben. 411.

12. Held, that even if it were a settled point, that, in cases of *Shoofa*, the claim, by litigation, under the Mahomedan law, should be preferred in one month, the law of limitation as laid down in Sec. 14, Reg. III. of 1793, cannot be superseded by such a restriction. 3rd March 1856. Dec. S. D. A. N. W. P. XI. 189.

13. Held that in a suit by the widow of a Moslem to recover from the joint heirs of her husband, the amount of dower due under her marriage settlement, the period of the cause of action must be calculated from the date on which the widow was ejected by order of Court from the property which she had first retained possession of in lieu of dower, and from the date on which the heirs were, as such, placed in a position to be sued. 17th November 1856. S. D. A. Ben. 841.

14. A precedent by the Court dated 24th March 1831, was referred to, to show that where the heirs of a Mosleem, had been kept out of possession by a widow on plea of her holding in satisfaction of her dower, and the heirs had afterwards recovered possession, the merits of the dower not being tried, she was allowed to bring her suit 20 years after her husband's death. Ib.

15. Decree of the lower Court, dismissing plaintiff's claim for pre-emption, because although he had adopted the preliminary precautions, he had failed to sue for five years, held not to have been passed on a legal ground. Case remanded. 24th February 1858. Dec. S. D. A. Ben. 305.

16. A special appeal having been admitted to try, whether, in the case of an endowment, where the proceeds are appropriated to the discharge of a religious trust, the ordinary principle of the law of limitation is applicable; held, that the property was not Wuqf, that is, property devoted to the deity on relinquishment of proprietary right; and that it was property claimed by inheritance, and subject to certain trusts, and thus in regard to parties interested in the inheritance, the ordinary law of limitation would apply. 18th May 1858. Dec. S. D. A. Ben. 1028.

17. The lower Court threw out a suit for pre-emption which had been instituted eight years after the cause of action arose, on the ground, that the Mahomedan law of Shuffa requires, that a claim for pre-emption shall be preferred without delay. Held, in appeal, that the limit allowed for the institution of a suit cannot be restricted by the operation of the Mahomedan law. 20th April 1859. Dec. S. D. A. Ben. 464.

Vide Pre-emption.

Dower 35 and Note.

Marriage 5.

MAHR.

MAHR MAUJJIL.

MAHR MUWAJJAL.

Vide Dower..

MAINTENANCE.

1. Held, that a woman having preferred a claim against her father-in-law for certain real and personal property, and her claim being dismissed, it is not competent to the Lower Courts to award her a monthly allowance (as maintenance) payable by the Defendant, no such claim having been preferred by her; and an order for the costs of suit to be paid by the successful party was reversed as contrary to the spirit and intent of the Regulations. Meer Ubdool Kureean *v.* Fukroonissa Begum. 2nd Aug. 1820. 3 S. D. A. Ben. Rep. 44.

2. A step mother having sued her step son for maintenance, decisions were passed in her favor by the Lower Courts; but on special appeal the Sudder Court held, that they are satisfied there is no provision of the Mahomedan law, requiring that an individual should maintain his widowed step mother, there being between the two no tie of consanguinity to call for such act of maintenance. Budday Saib *v.* Zoonoo Bee. 3rd Sep. 1853. Dec. Mad. S. A. 199.

3. A Mahomedan female sued her husband for maintenance, and the Zillah Judge in appeal decided that the Civil Court had no jurisdiction, as the husband was a camp follower; the wife then went to a Military Court and was non-suited, when she prayed the admission of a special appeal in the Sudder Dewanny Adawlut. Held, that the case belonged to the Military Court, and that the wife ought to have appealed to the Commanding Officer and Commander-in-Chief, and that not until then could the Sudder Dewanny Adawlut entertain the Case. 25th Feb. 1856. Cases in the S. D. A Bom. III. 39.

NOTE.—Although this is purely a question of jurisdiction connected with the construction of Act XI. of 1841, it is inserted in consequence of Commanding Officers in the Madras Presidency having refused to entertain similar suits; and in one instance wherein an opinion had been obtained by a Colonel Commanding a Corps of Native Infantry, and the opinion delivered was that the claim was only cognizable by a Military Court, a Civil Judge and Deputy Assistant Judge Advocate General, pronounced it to be erroneous. A complaint having been made to the Major General Commanding the Division, he declined to order the admission of the suit before a Military Court.

MANAGER.

1. A Mussulmaun manager of a joint estate is liable to account for all the profits and interest which he may make by the estate come to his hands, excepting only for interest unlawfully taken by him from Mussulmauns for the loan of money to them. 24th July 1817. East's Notes, Case 70, Cal. Sup. Ct.

2. The son and daughter of an absent Mahomedan (declared to be forty years old when he left, and to have been missing thirty-five years) sued for the recovery of one-half of the family estate from the widow and son of his brother. The law officers declared ninety years from the time of birth to be allowed to a person in possession of an absentee's estate, but that another administrator of the estate should be appointed if it were mismanaged by the person in possession. The Court held, that, under the circumstances, the estate appeared to have been mismanaged, and ordered the heirs of the absentee to be put into possession of his share. 1820. 2 Borr. 20 Bom. S. A.

MARRIAGE.

1. When a Mahomedan man and woman live together as husband and wife, they will be presumed to be man and wife, though not publicly married, when nothing appears to invalidate that presumption; and a son born under such circumstances inherits equally as a son in proved wedlock, and is not divested of his right as one of the heirs to the estate of his paternal uncle, though discarded by the latter. 28th April 1814. 2 S. D. A. Ben. Rep. 112.

2. Where one witness stated that he *conjectured* that the mother of the Plaintiff was married to A, but admitted that he was not present at the marriage, and that he never heard A acknowledge the marriage; and the Defendant, denying the marriage, acknowledged that the Plaintiff's mother was the Haram, or concubine of A; it was held that such expression, in conjunction with the conjectural evidence of one witness, cannot raise a presumption in favor of the marriage. 6th Aug. 1821. 3 S. D. A. Ben. Rep. 102.

3. According to the Mahomedan law, continued cohabitation and acknowledgment of parentage form sufficient presumptive evidence of wedlock and legitimacy. 15th April 1822. 3 S. D. A. Ben. Rep. 152.

4. And the same point was decided by the Judical Committee of the Privy Council. 2nd Aug. 1844. 3 Moore's Ind. App. 295.

5. The fact of a Mussulmaun woman's having suffered forty-two years to elapse since the death of her alleged husband, without advancing any claim to her share of his property, although many suits had been brought in this interval by the other heirs, was held to furnish strong persumption that she was not lawfully married to him. 27th Nov. 1827. 4 S. D. A. Rep. 283.

6. Filial relationship, including right of inheritance, to a Mussulmaun, in the child of his domestic concubine (such child affirming, if capable of speech), is established by his unretracted recognition; provided, however, that paternity be not commonly imputed to another man. 15th March 1830. 5 S. D. A. Ben. Rep. 17.

7. A child born in wedlock is presumed to be the child of the father; legitimacy following the marriage bed. 5th Feb. 1844. 3 Moore's Ind. App. 245.

8. The mere fact of a Mussulmaun and his wife living separately is not sufficient evidence of a divorce to enable the wife to recover dower not exigible. (Muwajjal). 26th June 1841. 7 S. D. A. Ben. Rep. 40.

9. A Mussulmaun husband was admitted to give evidence in favor of his own wife. 1st Term 1843. 1 Fulton, 143. Sup. Ct. Cal.

NOTE.—Although according to Section XX. Act II. of 1855, a husband and wife are now competent witnesses for and against each other, I cannot refrain from inserting Mr. Fulton's note on this Case, which distinguishes very clearly the relative positions of wives under the English and Mahomedan law.

"It is primâ facie an anomaly, that whilst a Mahomedan husband is not allowed to give evidence in favor of his wife by the Mahomedan law, nor an English husband, to give evidence in favor of his wife, by the English law, a Mahomedan husband's evidence should be admissible in favor of the wife in an English Court of Justice administering Mahomedan law. In this case, however it must be remembered that the Court merely administers the Mahomedan law of contract, and is not to be guided in the investigation of facts (for which purpose only evidence is adduced) by the Mahomedan law of evidence. In the investigation of facts, no matter what law is to be administered after they have been brought before the Court, the Court must in every case be guided by those principles which it considers the best for arriving at the truth; that is to say, the principles laid down

by its own law of evidence. Now the English husband is excluded, because, in the eye of the law, the husband and wife are one person, and the reception of his evidence would militate against the principle, that no man can give evidence in favor of himself. But by the Mahomedan marriage contract this unity of person is not created. The Mahomedan wife is an independent personage, and has her separate rights and separate property, and she and her husband may enter into contracts without the intervention of trustees; no greater objection, therefore, exists to the admission of the Mahomedan husband than to that of any other connection or relative. For the same reason, the Mahomedan may sue and be sued in her own name." Fulton.

On this Morley observes, "this point of the law of evidence was not expressly decided in the case above noted, but it has prevailed in practice. I may add, that, even by the Mahomedan law, this inadmissibility of the husband to give evidence in favor of his wife prevails only among the Suniys, and has given rise to much contention with the Shias, who maintained the opposite doctrine. Mor. Dig. Vol. I. p. 222.

Upon somewhat similar reasoning the Court of Foujdary Adawlut, Madras, ruled in Cir. Or. 4th March 1830, that husbands and wives, Mahomedan or Hindu, were competent witnesses for and against each other.

10. Supposing a Mahomedan to have married four slave girls, and then a free woman, the last marriage is good, and is not a fifth marriage, for marriage of slave girls is of no effect in law. 20th Feb. 1801. 1 S. D. A. Ben. Rep. 48.

11. A man may not marry his wife's sister, his wife being alive; no defect, however, arises in the first marriage, from the invalidity of the second; and on the death of the husband the whole dower of his first wife is claimable out of his property. 5th Feb. 1823. 3 S. D. A. Ben. Rep. 210.

12. A Mussulmaun cannot legally have more than four wives at the same time. 27th November 1827. 4 S. D. A. Ben. Rep. 283.

NOTE.—A slave can only have two. Prin. 57, par. 8.

13. A second marriage of a woman during her first husband's life time is invalid, if no divorce have taken place; and such second marriage forms no bar to the recovery of her person by her first husband, on civil action notwithstanding her unwillingness to go back to him. 20th April 1841. 7 S. D. A. Ben. Rep. 27.

14. A Mahomedan feme covert, may sue, or be sued alone. 1st Term 1843. 1 Fulton 143, Sup. Ct. Cal.

15. It appears that a Mangni between Mahomedan parties will be annulled where the woman is unwilling to fulfil the contract. The evidence of the caste (Mussulmaun goldsmiths) in this case as to the legality of annulling a Mangni was extremely contradictory. The law officers declared, that if, at the time of con-

tract, the girl were willing, but not of perfect womanhood or understanding; or if being of perfect womanhood or understanding, words signifying agreement and consent had not passed between her mother, herself, and her proposed husband in the presence of two witnesses; and if afterwards she should be unwilling to celebrate the marriage; then the contract was void; for this reason, that the consent of the woman is one of the points necessary to perfect a marriage. 1st May 1820. 2 Borr. 556. S. A. Bom.

NOTE.—The Mahomedan law of marriage contract will be found in 1 Hed. 72, et seq. Macn. Prin. M. L. 58, par. 14, 16, 18, 252, 264, 267, 268. Morley.

NOTE.—For the customs and ceremonies attending betrothal and marriage. Vide Herklot's Mussulmauns or the Qanoon-e-Islam.

The following Note contains a summary of the law of Marriage Contract: "A girl not having attained the age of puberty cannot contract herself in marriage without the consent of guardians; but she may do so without such consent, if she have attained such age. Macn. Prin. M. L. 58, par. 14, 16. But should she have contracted herself, not being of nubile age; the guardian should interfere before the birth of issue. Ib. par. 17. A damsel under age, contracting herself in marriage to an equal, and the guardian afterwards allowing such marriage, may annul the contract immediately on becoming of age, but not afterwards. Ib. 264. Nor if she had, during her minority been married by her father or her paternal grandfather. Ib. 58, par. 18, 265, Case XVI. The distinction between the case of a female who has attained the age of puberty contracting marriage, and one who has not attained that age, is, that in the former case the marriage is valid, but voidable by the guardians where inequality appears; and that in the latter case the contract is void *ab initio*, if entered into without the consent of the guardians; but such consent may be implied as well as express." Ib. 268. Morley.

16. A Mahomedan woman of her own accord, contracted herself to A, and lived with him six months, and, together with her mother and sister was maintained by him: she afterwards left A and got married to B, to whom she had been previously contracted. It was held that she was liable for the repayment of all monies expended on her during her residence with A. 3rd July 1823. 2 Borr. 553. S. A. Bom.

17. It was held that a Mahomedan girl, when she arrives at the age of puberty, is at liberty to marry whom she pleases; and if her parents have previously contracted her in marriage, and she should not, on arriving at such age, approve of such marriage, the contract would not be good in law. 5th July 1821. Sel. Rep. 56. S. A. Bom.

18. According to the Mahomedan law, a *Nikah, or betrothal,* made by a father of his daughter during her minority, cannot be set aside by her on coming of age; but she is justified in not leav-

ing her parents without first receiving the exigible dower. 24th June 1840. 6 S. D. A. Ben. Rep. 293.

NOTE.—Under the Mahomedan law a Nikah, is a legal marriage. Mad. S. A. Pro. 15th March 1837, and in Proceedings of the 17th July 1837 (Civilian's Remembrancer), a case is noticed wherein a Nikah wife was allowed maintenance from her husband.

Nikah, as explained by Shakespear, is an Arabic term signifying marriage, or matrimony. "It is the most honorable kind of marriage, though in Bengal, the term be only applicable to a secondary kind. Nikah-i in Arabic and Persian means a married woman. The glossary appended to the 1st Vol. of Morley's Digest explains Nikah to mean likewise "betrothal," in which sense it is used in the preceding case, but neither Shakespear nor Richardson assigns such a meaning to the word. The case referred to shows that something more than betrothal had taken place, in fact, that Nikah or the marriage ceremony had been performed, consequently the girl could not retract on attaining maturity (vide Macnaghten, p. 58, para 18); whereas a promise of marriage cannot be legally enforced (pp. 250, 251 and 252), although dower in consideration of the future marriage may have been sent.

It is commonly supposed that a difference exists between a Shadee and a Nikah wife. The former designation is generally applied to a first marriage attended with the usual music, processions, &c., and the latter to second marriages, and chiefly, to second marriages contracted by Mahomedan females. In the Proceedings of the Madras S. A. dated 2nd August 1837, and certain decisions of the Bombay S. Adawlut reported by Morris, the term is also applied to a second Hindu marriage, probably between parties of a low caste among whom second marriages occur.

Dr. Herklot in a Note at page 128 of his translation of the Qanoon-e-Islam thus notices the term Nikah; "*Neekah* and *Shadee* are often used synonymously, though in Bengal the former is only applied to a second kind of marriage called half-marriage. By the ignorant it is esteemed unlawful and disreputable, equivalent to keeping a mistress. Whereas, in reality it is the foundation of matrimony, *Shadee* signifying, and being merely the rejoicings on the occasion.

"The ceremony of *Neekah* would appear, by Mrs. Meer Hassan Ali's statement to be called, in that part of the country where she resided, *burat* (assignment), because on that night the dowry is fixed, and generally the bridegroom takes his wife to his own home." Ib. p. 383.

The author of the Qanoon-e-Islam applies the term "*Nikah*" to the whole ceremony of marriage, viz., the reading from the Koran, the prayers, the joining of the bridegroom's and vakeel's hands, &c. In the Hedaya Vol. I. p. 302, Nikkah is defined to be "the legal union of the sexes," and at page 71, "in the language of the law it implies a particular contract for the purpose of legalizing generation." From page 72 it likewise appears that the bare use of the word "Nikkah" is sufficient to constitute a contract of marriage. Vide also p. 525, Vol. I. of Maskell's Circular Orders of the Board of Revenue, Madras, wherein the offspring of a Nikah marriage was pronounced by the law officers of the Madras Sudder Court, to be equally legitimate with the offspring of a Shadee marriage. The correctness of this exposition is so clear, that the case would not have been noticed had the doubt not been expressed.

The distinction between the terms is obvious. Shakespear defines Shadi to mean, pleasure, delight, joy, marriage festivity, rejoicing; and Shadiyana, musick, and singing at marriages or on other festive occasions. Nikah in fact means the marriage ceremony. Shadee the wedding festivities, which at page 258 of Macnaghten are pronounced not to be essential to the contract.

I have been thus particular in noticing the term *Nikah* in the hope of being able to expose a popular fallacy respecting marriages so called.

19. A kabin nameh, or deed of marriage settlement, containing a gift by the husband to his wife of the whole property possessed by him, or which might thereafter come into his possession, is valid, under the Mahomedan law, in regard to the property in the actual possession of the husband, but not in regard to that which is non-existent. 30th June 1835. 6 S. D. A. Ben. Rep. 30.

20. A kabin nameh is invalid in respect to property not in possession of the husband at the time of the execution of the deed. 10th March 1843. 7 S. D. A. Ben. Rep. 123.

21. It was held that a kabin nameh is invalid if the property conveyed by it be not specified. 17th April 1844. 7 S. D. A. Ben. Rep. 158.

NOTE.—The deed in case 19 was looked upon simply as a deed of gift and justly so: the decision proceeded therefore, on the ground that, by the Mahomedan law, property non-existent cannot be made the subject of gift, whether in lieu of dower or otherwise. Morley.

22. A husband may recover the person of his wife by civil action. 5th May 1832. 5 S. D. A. Rep. 200.

NOTE.—This doctrine was propounded on the ground that a wife has no right to separate herself from her husband, unless by reason of a divorce. Morley.

23. By the Mahomedan law divorce is not demandable as a right by a wife, on payment of consideration. 5th May 1832. 5 S. D. A. Rep. 200.

NOTE.—But a wife is at liberty with her husband's consent, to purchase from him her freedom from the bonds of matrimony. Morley.

24. Where a Mahomedan woman had obtained a decree against her husband for the recovery of her dower, but which decree had not been executed, nor the dower paid, and he brought an action against her to compel her to come and live with him against her will; it was held, that according to the Mahomedan law, it is not imperative for a wife to reside with her husband until her dower is paid; and the husband was non-suited and made liable for all costs. 9th May 1832. Sel. Rep. 103. S. A. Bom. Vide 1 Hed. 150

25. A contract made by a man with his first wife not to marry a second wife is not illegal, and an action may be sustained if damages can be proved. 16th March 1838. 1 Fulton 361. Sup. Ct. Cal.

26. A second marriage of a woman, during her first husband's life, and without having been divorced by him is no bar to the recovery of her person by her first husband, on civil action, notwithstanding her unwillingness to return to him. 20th April 1841. 7 S. D. A. Rep. 27.

27. A special appeal being admitted by the Court of Sudder Udalut, in order that the point might be determined as to whether the marriage of the Plaintiff to the 3rd Defendant within 4 months and 10 days from the death of her first husband was valid under the Mahomedan law ; the Court, on the authority of the Cauzee-ool-Coozat, declared, that the marriage was null and void, and that the Plaintiff had no claim for provision of any sort from the 3rd Defendant. 5th Sep. 1855. Dec. Mad. S. A. 157.

NOTE.—Four months and ten days is the period of mourning appointed for a woman who has lost her husband (1 Hedaya 370), and is considered the edit of widowhood. (Ib. 360.)

28. Vide APOSTACY 2.

29. The legitimacy of the Plaintiffs was objected to, on the ground that their mother was not the wife of their father, but a Native of Cashmeer, whom their father had brought away without marrying her. It being however proved by evidence, that the children by her were always regarded by their father as legitimate children, and the Cazy-ool-Coozat, having given an opinion (founded on the circumstances of the case) in favor of the (presumption of)marriage ; held, that the mother was the wife of the father of the Plaintiff, and that the children are legitimate. 28th June 1849. Dec. S. D. A. N. W. P. IV. 204.

30. In a case of disputed marriage the following judgment of the Zillah Court was upheld by the Sudder Dewanny Adawlut at Bombay :

"The Court is of opinion that the Sudder Ameen decreed on insufficient grounds, that the marriage had taken place between Umeer-beebee and Shaik Hoosein. The Soobadar and Umeer-beebee were both residents of the city of Surat. The marriage, it is alleged by the witnesses, took place at Akleesur, though not so alleged by her in her plaint. The only two

witnesses who depose to having been present at the marriage are two peons of Randiar Kusba. No marriage register is forthcoming, as there is none at all for Akleesur. The two peons who allege that they went upon an invitation only, are evidently not the description of people whom the Mahomedan law contemplated as sufficient to prove such a marriage; at least such is the opinion of the law officer of this Court. No neighbours or relatives of either party were present, or produced to give evidence in this case. No reason is shown why the marriage should have been celebrated at Akleesur, nearly forty miles from Surat. The Sudder Ameen's decree is therefore reversed. 1st Dec. 1856. Cases in the S. D. A. Bom. III. 387.

NOTE.—It will be observed that the decision was not passed on a presumption of Mahomedan law founded on reputation of marriage, but apparently on a fact put in evidence.

31. Objection to the validity of a marriage in consequence of one party being a *Sheea*, and the other a *Soonnet*, over-ruled. 8th Sept. 1851. Dec. S. D. A. N. W. P. VI. 350.

32. The Court held a disputed marriage not to have been proved, observing that evidence brought to prove a marriage, and a Kabin-nama on such a marriage, in a respectable Mahomedan family, will be viewed with much distrust, where none of the leading members of the family, or other persons of consideration, are among the witnesses. 21st May 1851. Dec. S. D. A. Ben. 356.

33. In case of a disputed marriage between a Mahomedan and Hindoo woman held, a declaration and consent of the parties is all that is required by the Mahomedan law to establish the legality of a marriage. Budun Chund, it is said, was a Hindoo woman; she however lived for years with Hamoodoollah, as admitted by all parties, and several documents are on the record wherein she is styled his wife. In one deed, however, she is not styled *wife* but *kept mistress* of the deceased—but this deed is filed by the plaintiff—and though she is called the kept mistress, yet the continual cohabitation of parties, which under the Mahomedan law* affords a presumption of marriage, and the circumstances above adverted to, justify the conclusion that, irrespective of the Kabin-nama, Budun and Hamoodoollah were legally married. 2d Sept. 1852. Dec. S. D. A. Ben. 885.

* See page 58, Macnaghten's Mah. Law.

34. In a case wherein the legitimacy of the plaintiff was called in question on the ground that his mother was a Hindoo prostitute, not married to his reputed father; held that the evidence proved the marriage, and that evidence as well as the father's acknowledgment, established the plaintiff's legitimacy. 24th Nov. 1853. S. D. A. Ben. 932.

35. Under the Mahomedan law, marriage will be presumed in a case of proved continual cohabitation, even without the testimony of witnesses. 21st Feb. 1857. Dec. S. D. A. N. W. P. 75.

36. Where there was no documentary evidence in the shape either of a deed of dower or deed of marriage settlement, and no written document of any sort acknowledging A's marriage with B (a a woman who had been divorced from her first husband); and where no act of A, subsequent to the alleged marriage, and prior to his decease, had been shown to admit of inference of acknowledgment of marriage; B's claim (to be considered A's widow), which rested solely on the oral testimony of parties, who are alleged to have been present at the ceremony, or who heard of the marriage, was held not to be proved. 28th Feb. 1857. Dec. S. D. A. Ben. 295.

Vide Dower.

MISSING PERSON.

Vide Death.

MOHURUM.

1. In a suit instituted by a Mussulmaun against a Hindu to establish his right to take his taboot first in the procession of the Mohurum which right he stated was constantly interfered with by the Hindu, judgment was passed in his favor by all the Courts, on the grounds, that the evidence fully established the claim; and that the defendant, being a Hindu, was not entitled to take a part in a Mahomedan festival. 27th April 1849. Morris' Sel. Dec. S. A. Bom. Part II. 91.

2. In a suit instituted to establish the right of the plaintiffs to dance round the *ulawa* or firehole, during the Mohurum, judgment was given in their favor, and it was ruled, that although all play and noise during the Mohurum are prohibited, whether beside the Musjid, or in any place apart from it, over the *ulawa*; and it was very improper and contrary to Mahomedan law to play at the *ulawa* beside the Musjid, yet the right sought had been rightly determined, the usage of the

country having been admitted to be in favor of the plaintiffs. Whether this usage was contrary to the Mahomedan law or not, was a question which need not arise in the suit, as the decision did not preclude the enforcement of any pains and penalties, that might be incurred by either party, for infringement of their religious law. 6th Nov. 1849. Morris' Sel. Dec. S. A. Bom. Part II. 139.

MORTGAGE.

1. Where a Mahomedan mortgaged a house, and subsequently sold it to another person, to whom he gave immediate possession, and the mortgagee never had possession ; it was held that the possession of the house by the purchaser gives him a preferable claim to the mortgagee who had not been put in possession, as until the house had been taken possession of by the mortgagee, the agreement was not binding. 1835. Sel. Rep. 165 Bom. S. A.

2. Where certain *Inaam* land granted for the service of the Musjid, was attached, in satisfaction of a decree obtained by a mortgagee of the property against the descendants of the original grantee, who had mortgaged it to him ; it was held, that, by the Mahomedan law, the mortgage was illegal and void, as land appropriated to religious purposes could not be sold or mortgaged by any of the descendants of the original proprietor ; and the Court agreed that the attachment should be raised. 1839. Sel. Rep. 204, Bom. S. A.

3. A *Bay-bil-wafa* sale of land, made by an agent on the part of the owner, was declared void in Mahomedan law, from the agent having exceeded his powers, from its being a sale at a gross inadequacy of price, and from the presumption of collusion between the buyer and the agent. 30th Sep. 1801. 1 S. D. A. Ben. Rep. 55.

NOTE.—In the cause of Busnut Ali Khan *v.* Ram Koman, decided by the Sudder Dewanny Adawlut on the 4th January 1799, there was a question put to the law officers respecting the legality of *Bay-bil-wafa* sales, though the cause, as it happened, went off on a question as to the competency of the agent, who made the *Bay-bil-wafa* sale, in that instance, on the part of another. It was stated in the *Futwa* then given that a sale with the optional condition for three days is good, but for more than three days is not good, according to *Hanifah* and *Yusaf ;* but according to Mahommad for four days, or even a longer period, is good ; that the sort of sale being prevalent in the Country, Mahommad's opinion should be followed. The intention of the parties, as collected from the tenor of the deed, shows, whether the *Bay-bil-wafa* be a sale, with the reserve of an option of retractation, within a limited time ; or a mortgage for the security of money

lent. A stipulation for a short period must be considered to mark that a sale was in the contemplation of the parties: a long term denotes a mortgage or security for a loan; and such mortgages, in the form of conditional sales, are very common, and rightly held valid under the opinion here cited. In the present case the inadequacy of the consideration was a sufficient ground for allowing the equity of redemption under the exposition of the Mahomedan law, that inadequacy of price vitiates a sale by an agent. See 3 Hedaya 23. Morley.

4. A deed of *Bay-bil-wafa*, executed on land for a sum of money, in favor of a person through whom, not from whom, the money was borrowed, is not valid in Mahomedan law. 7th May 1804. 1 S. D. A. Ben. Rep. 78.

5. A sold to B certain villages, which he had previously sold under *Bay-bil-wafa* to C on the suit of B against A and C—the lower Courts decreed specific performance of the contract in favor of B, C receiving the money due on his conditional sale. The Sudder Dewanny Adawlut reversed the decision of the lower Courts, on the grounds that, by the Mahomedan law, C, not having assented to the sale, B should have waited till A had redeemed, or might have had recourse to his action to annul the sale for non-delivery; and that it was inconsistent with the regulations, and the Circular Order of the Court of the 22nd April 1813, constructive of Reg. XVII. of 1806 (whereby the interference of the Courts, as to the possession of either conditional buyer or seller is prohibited) the sale of part of the mortgaged property having become absolute prior to the award of the lower Court, and the term of revocability of the remainder having expired. 14th Aug. 1832. 5 S. D. A. Ben. Rep. 226.

6. The wife of a banished Mahomedan may bring an action to compel the redemption of mortgaged property, there being a proviso in the mortgage bond that the mortgagee might at any time compel redemption on giving five months' notice; and so long as she is content to remain the wedded wife of the banished man, and does not take means to divorce herself, she is legally capable of maintaining the action, and recovering the debt sued for. 20th Dec. 1823. 2 Borr. 639, Bom. S. A.

7. In a claim to redeem a village from mortgage the plaintiff was allowed to recover half of the village by paying one-half of the mortgagee's money, that being the portion to which he was declared entitled, by the law of inheritance, as heir to the original mortgagor. 14th March 1825. 4 S. D. A. Ben. Rep. 32.

8. A mortgage is completed by possession. Of two mortgages, the later supported by occupation, was held to annul the prior

unaccompanied by possession. 31st July 1821. 2 Borr. 130 Bom. S. A.

9. Where A claimed from B, his cousin, the moiety of the estate of their grandfather; it was held, on proof that it was the joint inheritance of the parties, that A was entitled to the moiety, though a mortgage debt, contracted by B's father to make good arrears of revenue when he had the management of the estate, was paid by B. 5th Nov. 1811. 1 S. D. A. Ben. Rep. 355.

10. An equity of redemption was decided to be saved by the repayment of the money borrowed on the mortgage within the period of one year from the receipt by the mortgagor of the notice to pay issued under Reg. XVII. of 1806, as required in such notice. 12th Jan. 1825. 4 S. D. A. Ben. Rep. 5.

11. A Mahomedan died leaving a widow and child. The latter was acknowledged by the former as sole heir to his deceased father's estate, without any reservation on account of her dower, and she signed a Warasah nameh (or acknowledgment of heirship). The son obtained possession of the estate under this Warasah nameh, and borrowed money on the pledge of the estate. The widow sued her son for her dower, held, that although according to usage, a claim for dower should be satisfied in preference to other claims of whatever nature, yet, under the circumstances, it was consonant both with law and equity to consider that the mortgagee had a prior claim to that advanced by the widow. 5th Nov. 1845. S. D. A. Dec. Ben. 317.

12. A mortgagee, a Mahomedan, may transfer his rights and interests in a mortgage held by him upon real property; and the Mahomedan law cannot be applied to such cases. 14th June 1848. 7 S. D. A. Ben. Rep. 511.

NOTE.—In this case the mortgagee had sold his right before he had sued for possession, although he had got the usual order for that purpose as under a foreclosed mortgage. The lower Courts decided, according to the rules of the Mahomedan law, that the mortgagee could not sell that of which he had not possession; but the Sudder Dewanny Adawlut held, that the law could not be applied, this being a case of contract, and therefore not coming within the provisions of Sec. 15 of Reg. IV. of 1793, and Secs. 8 and 9 of Reg. VII. of 1832. Morley.

13. A mortgagee cannot sue for a division of a joint undivided estate, the proprietors alone being the persons contemplated by Reg. XIX. of 1814, who are competent to make such an application. 8th Feb. 1847. 2 Dec. S. D. A. N. W. P. 32.

14. A tender of the money due on a *Ba-bil-wafa*, made by one of several mortgagors, or of their representatives, is a legal tender, and entitles him to redeem the property, and save the sale from becoming absolute. 20th July 1846. 1 Dec. S. D. A. N. W. P. 81.

NOTE.—This case was between Hindus, but is inserted as illustrative of an incident to which *Bay-bil-wafa* mortgages are liable.

15. A party claiming mortgaged property on the ground of a prior purchase, must make an unconditional deposit of the sum due to the mortgagee before he can obtain possession. 26th July 1849. S. D. A. Dec. Ben. 311.

16. Where usufructuary mortgagees sublet the mortgaged property to third parties of their own choosing, and agreed to receive a certain stipulated annual payment; it was held, in a suit for recovery of the mortgage money, that such agreement could not be held to bar their responsibility for the gross receipts derivable from the estate, and that they are bound to produce in Court an account of the gross receipts of the mortgaged property for the time they held it, verified on oath or solemn affirmation. 31st Aug. 1846. 1 Dec. S. D. A. N. W. P. 131.

17. Before a decree can be given for a money payment, due on an usufructuary mortgage, the mortgagee is bound to prove that he had been either wrongfully, or prematurely ousted from possession of the mortgaged property, or that there had been some failure in the engagement on the part of the mortgagor. 31st Aug. 1846. 1 Dec. S. D. A. N. W. P. 131.

18. By the Mahomedan law, the Vendee of a pawner cannot recover an unredeemed pledge from a non-assenting pawnee, but may elect to wait redemption by the pawner, or to sue him to set aside the sale. 14th August 1832. 5 S. D. A. Ben. Rep. 226.

NATIVE FEMALES.

1. Where a confession of judgment, on the part of female defendants to a suit, was put in by the *male* defendants, *without the knowledge or consent of the female defendants*, who, from their secluded position, were not unlikely to be thus imposed upon, such confession of judgment was set aside altogether. 7th Sep. 1850. 5 Dec. S. D. A. N. W. P. 288.

NIKAH.

Vide MARRIAGE, NOTE TO CASE 18.

PARTITION.

1. A party instituting a claim for a share of his grandfather's property was non-suited on proof of separation, and the production by the other side of a Farikh-khatt, or release, signed by him for his share of the property. 6th Nov. 1817. 1 Borr. 205 Bom. S. A.

PARTNER.

1. By the Mahomedan law the right of pre-emption appertains to one partner over the share of another partner, as their property is joint and undivided, and he is a sharer in the thing itself. 15th Sep. 1813. 2 S. D. A. Ben. Rep. 85.

2. Two undivided Mahomedan brothers having been sued on a bond executed by one of them, the Lower Court decided against both, but on appeal the Court of Sudder Adawlut observed, the Civil Judge would seem to have declared the liability of the 2nd Defendant for the bond sued upon, on principles prevailing in Hindu law, whereby one member of an undivided family, may, under certain circumstances be held answerable for a debt incurred by another member. In the present case the parties are Mahomedans, and as explained by the Cauzee-ool-Coozat who attended during the hearing of the case before the Court of Sudder Adawlut, the 2nd Defendant could not be liable for the bond executed by his brother the 1st Defendant, unless, by some written instrument showing partnership in trade, he had incurred such liability under his own hand. No such instrument having been obtained from the 2nd Defendant, the Court absolve him from the bond. 20th Jan. 1855. Dec. Mad. S. A. 5.

3. A judgment creditor having attached certain property in satisfaction of the decree in his favor, the Plaintiffs sued to raise the attachment, alleging that the whole of the property attached formed their undivided ancestral estate. The creditor pleaded that he had only attached the share of the property to which his judgment debtor was entitled by Mahomedan law. Held, that the Mahomedan law permits the attachment of a share of an undivided property to answer a decree against one of the family. 12th May 1855. Morris' Cases S. D. A. Bom. II. 99.

NOTE.—The debtor was the brother and nephew of the Plaintiffs. A somewhat similar case is referred to in a note at page 101 of the same volume, but the decision was by a single Judge.

PLEADING.

1. In reviewing proceedings of the Native Courts of India, where the Hindu or Mahomedan law is the rule, and the form of pleading totally different from that in use in Courts where the law of England prevails, the Judicial Committee of the Privy Council will look to the essential justice of the case, without considering whether matter of form have been strictly adhered to. 8th Dec. 1840. 2 Moore's Ind. App. 344.

2. A Mahomedan suing as heir must set forth in the plaint how he is heir. 13th Feb. 1844. 1 Fulton 409, Sup. Ct. Cal.

PLEDGE.

1. By the Mahomedan law, the vendee of a pawner cannot recover an unredeemed pledge from a non-assenting pawnee, but may elect to wait redemption by the pawner, or to sue him to set aside the sale. 14th August 1832. 5 S. D. A. Ben. Rep. 226.

PRE-EMPTION.

NOTE.—Section I. Act XIV. of 1859, provides that suits to enforce the right of pre-emption, whether the same is founded on law or general usage, or on special contract, shall be instituted within the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached.

1. By the Mahomedan law the right of pre-emption appertains to one partner over the share of another partner, as their property is joint and undivided, and he is a sharer in the thing itself. 15th Sept. 1813. 2 S. D. A. Ben. Rep. 85.

2. On a claim of Shufaah, or right of pre-emption, founded on vicinage and partnership, it being proved that the plaintiff had made the requisite demand and protest on hearing of the sale, though payment was not immediately tendered, judgment was given in favor of the plaintiff, in conformity with the opinion of the Mahomedan law officers, on condition of payment by a certain day. 22nd October 1811. 1 S. D. A. Ben. Rep. 350.

3. A sells lands to B, conceiving himself entitled to do so as heir of his father, the former Mukarraridar; and C (late Malik) claims a right of pre-emption, declaring at the same time, that the estate of a Mukarraridar upon his death devolves on his heir; as, by the settlement concluded between the Government and the Mukarraridar, he becomes Malik of the proceeds of

his Mukarrari, with the exception of a portion thereof, which the late Malik receives as Malikanah; consequently the right of the late Malik is not wholly transferred to the Mukarraridar but he and the late Malik are to each other in the relation of partners, and the right of Shufaah appertains to one partner over the share of another, because such property is joint and undivided, and he is a sharer in the thing itself. C therefore, as late Malik, was decreed to have a claim to pre-emption. 15th Sept. 1813. 2 S. D. A. Ben. Rep. 85.

4. It was held, that if A, a Mahomenan trader, transfer lands to B by sale, and C afterwards come forward and establish his right of Shufaah, he will be entitled to the lands at the price paid for them by B, who will be compelled to refund the profit accrued during the period of his possession to C, receiving himself the purchase money from A. Ib.

5. In a suit by a Mahomedan to establish his superior right of pre-emption of a house bought by another person, it was held by the Register's and Judge's Courts, that the sale was void, on the ground of informality of the deed of sale (it not having been submitted to the Kazi), and leaving the right of pre-emption to be determined by a fresh action or the highest offer: but these decisions were reversed on appeal; and the Court held that the deed of sale was a valid instrument, and the respondent had failed to establish his right of pre-emption, having forfeited the same, under the provisions of the Mahomedan law, by declining to purchase the house in dispute previously to its acquisition by the Appellant. 31st May 1823. 2 Borr. 366, Bom. S. A.

6. In a suit by A to set aside a sale by B of a piece of land containing a burying ground, it was not proved by B that A had given up a right of pre-emption possessed by him; and as the Mahomedan law did not allow of the sale of burying grounds, the sale was annulled, liberty being given to B to make a fresh sale, excluding the burying ground, and giving such notice to A as his right of pre-emption entitled him to by law. 9th March 1824. 2 Borr. 682, Bom. S. A.

7. A respondent having been declared entitled to redeem from mortgage one moiety of a village as the portion to which he was entitled by the law of inheritance, as an heir of the original mortgagor, was informed by the Court that he was entitled to recover, by right of Shufaah, the other moiety which had been sold by his coheir. 14th March 1825. 4 S. D. A. Ben. Rep. 32.

8. A claim in right of pre-emption to property, the possession of which has been transferred by a deed of *Hibeh-bil-iwaz*, or gift for consideration (such consideration being expressly stipulated), is good under the Mahomedan law. 29th July 1835. 6 S. D. A. Ben. Rep. 34.

9. And this, notwithstanding that the consideration stipulated in the deed of gift be considerably below the real value of the property. Ib.

10. Where a Mahomedan might have had cognizance of the sale of a piece of ground, to the pre-emption of which he was entitled, and did not prefer his claim till a considerable time after the sale, his right of pre-emption was held to be forfeited, as he should have filed a suit within one month against the vendor. 7th Feb. 1839. Sel. Rep. 178, Bom. S. A.

11. Under the Mahomedan law pre-emption cannot be claimed in a case of *Bay taljiah*, or fictitious sale made to serve a temporary purpose. 10th Dec. 1840. 6 S. D. A. Ben. Rep. 306.

12. In a case of *Bay taljiah*, a lease of the property from the alleged purchaser to the seller does not render the sale absolute, so that pre-emption can be claimed. Ib.

13. Pre-emption if not claimed immediately is barred. Ib.

14. But pre-emption cannot be claimed where the consideration is not expressly stipulated. Ib.

15. A party having claimed the right of pre-emption in certain lands, and obtained a decree, is not at liberty to withdraw from his claim in consequence of the resumption of the lands by Government, and the conclusion of a settlement with other parties. 4th May 1841. S. D. A. Sum. Cases, 9.

16. The right of pre-emption, decreed on condition of the payment of the purchase money within one month, was held to be lost on failure of the payment within the time prescribed. 26th Dec. 1840. 1 S. D. A. Ben. Sum. Cases Pt. 1, 51.

17. A purchaser of a portion of an estate is not barred from a right of pre-emption of another portion, on the ground that he himself had purchased only three years before the institution of his suit. 7th May 1846. S. D. A. Dec. Ben. 176.

18. The resumption of lands by Government, and a settlement made with a purchaser of a portion of an estate, does not bar the right of pre-emption in the possession of another portion. Ib.

19. A sale or mortgage of an estate to a third party, by one of the co-sharers in such estate, being an infraction of the *Wajib-ul-arz* in the Collector's office, by which the Vendor and sharers

bound themselves not to sell the estate to a stranger without first endeavouring to obtain a purchaser among their co-sharers, is insufficient to give one of the sharers a right of pre-emption if he have forfeited that right by refusal to purchase at a fair valuation. 11th August 1847. 2 Dec. S. D. A. N. W. P. 249.

20. The parties to a sale may cancel the contract between themselves, but their annulment of a sale which has been completed cannot set aside the right of a third party to pre-emption. 8th February 1848. 3 Dec. S. D. A. N. W. P. 47.

21. The Malik of a resumed rent free tenure, which has been settled with the Maafidar, has not the right of pre-emption, on sale of the property by the latter. 30th December 1848. 7 S. D. A. Ben. Rep. 561. 9th August 1849. S. D. A. Dec. Ben. 344.

22. A party having been *Malik* of certain land, formerly an *altamgha* grant, and afterwards constituted a *Muhall*, or estate permanently settled with those who were the rent free holders of the said grant, has no right of pre-emption; the permanent settlement of the land, as a separate estate, completely separating the property from the *Malik*, who in futurity had no further concern in the land, in lieu of which he was entitled to receive a money allowance from the Government Treasury. 9th Aug. 1849. S. D. A. Rep. Dec. Ben. 344.

23. When the Sudder Board in a certain letter, had declared that where a *Butwarra* of the estate had been properly carried out under the law, a claim of pre-emption would not lie; it was held, that such letter was no authority for setting aside the Mahomedan law in a suit brought to set aside the sale of the estate under the provisions of that law, with regard to the right of pre-emption. 3rd May 1849. 4 Dec. S. D. A. N. W. P. 103.

24. A right of pre-emption cannot be claimed previous to actual sale. 22nd April 1848. 7 S. D. A. Ben. Rep. 487. 23rd July 1850. 5 Dec. S. D. A. N. W. P. 189.

25. A party whose house is in the same compound, or inclosure as the one sold, (both having a common entrance through the inclosure) has a superior right of pre-emption to another party whose house adjoins the one sold, but is separated from it by a wall. 26th Dec. 1850. S. D. A. Dec. Ben. 602. 3 Hed. 562, 564.

26. By the Mahomedan law a claimant for the right of pre-emption, is bound to bring forward his claim immediately on hearing of the sale, and the notice of a year issued previously to a conditional sale becoming absolute, was held to be sufficient notification to all parties concerned, and to preclude a party from claiming a right of pre-emption unless immediately after such sale had become absolute. 25th Jan. 1847. S. D. A. Dec. Ben. 22.

27. A claim for the right of pre-emption under the Mahomedan law, was disallowed on failure of proof that the *Talab-i-Muwasabat*, or immediate demand, had been made by the claimant. 19th July 1847. S. D. A. Dec. Ben. 267.

28. A claim to the right of pre-emption was dismissed, the "immediate demand" required by the Mahomedan law not being proved. 17th June 1848. S. D. A. Dec. Ben. 533. 22nd July 1848. S. D. A. Dec. Ben. 709.

29. It is sufficient that the right of pre-emption has been demanded before witnesses from one of several sellers, and the presence of all the sellers is not necessary to render the assertion of such right legal and formal. 17th June 1848. 7 S. D. A Rep. Ben. 424.

30. A party claiming on a right of pre-emption must according to the Mahomedan law, prefer his claim founded on that right, *immediately* on knowledge of the sale *however acquired.* 4th April 1850. S. D. A. Dec. Ben. 99.

31. The *immediate claim* to a right of pre-emption is not restricted to any particular form of words; and it was held sufficient to establish such claim where the claimant, immediately on hearing of the sale, cried out *Kharid kiya* three times. 27th June 1850. S. D. A. Ben. Dec. 321.

32. Where a claimant to a right of pre-emption, immediately on hearing of the sale, sent several persons with the money to be tendered to the vendor and purchaser, and to demand the delivery of the deed of sale; it was held, that all but the actual agent so sent to make the tender were witnesses in the legal sense of the word; i. e. persons sent to see the tender made, and who did see the tender made, and deposed to having seen it. Ib.

33. If the immediate demand and tender of price be made to one of

several joint sellers, or purchasers, it is good in law. 23rd Dec. 1850. S. D. A. Dec. Ben. 585.

NOTE.—When the right of pre-emption exists among Hindus, it is subject to the rules and regulations of the Mahomedan law. 7 S. D. A. Rep. 129. Morley Vide Case 39.

34. A party having claimed the right of pre-emption in certain lands, and obtained a decree, is not at liberty to withdraw from his claim, in consequence of the resumption of the lands by Government, and the conclusion of a settlement with other parties. 4th May 1841. S. D. A. Ben. Sum. Cases, 9.

35. In a suit for pre-emption the decree should record the points proved in evidence, to enable the appellate Court to judge whether the law has been properly applied. 6th February 1847. S. D. A. Dec. Ben. 44.

NOTE.—The parties in this case were Hindus, but as the Mahomedan law of pre-emption is applicable where they are concerned (vide Note to Case 33 and Case 39), the rule is general.

36. Where, in a suit for pre-emption, the lower Courts' decrees set forth that the requisitions, preliminary to a claim by pre-emption had been complied with, but did not state what those requisitions were, and what in the judgment of the zillah judicial authorities, the law required in that respect, the case was remanded. 13th January 1848. S. D. A. Dec. Ben. 12.

37. Evidence to the preliminaries to the protest and demand, as laid down in page 183 of *Macnaghten's Mahomedan Law*, is essential to the proof of the pre-emptive claim (vide page 182), and application to a third party, which the plaintiffs, it appears, adduced as a further proof of their desire to purchase, cannot be regarded as making up for any defects in the original conditions. 16th June 1851. Dec. S. D. A. N. W. P. VI. 214.

38. The lower Courts having in a claim for the right of pre-emption, decided that both parties possessed the right, and having accordingly decreed partly in favor of plaintiffs, allowing the defendants to retain a portion of the land purchased; the *Sudder Dewanny Adawlut* ruled, in special appeal, that there can be no such thing as a *divided* right of pre-emption; and that the entire and unmutilated title must vest in one party or the other. It was further ruled that the plaintiffs had by their own laches, forfeited for the time whatever claim by right of pre-emption, they may have once possessed; but that they

still had the right to purchase in preference to an entire stranger, should the property again come into the market. 23rd June 1851. Dec. S. D. A. N. W. P. VI. 231.

NOTE.—This case was between Hindoos.

39. In this case the defendant (a Hindu) met the claim by denying that the pre-emption-right (to establish which a Mussulmaun had instituted the suit), was recognized by Hindoo law. This plea was overruled by the Sudder Dewanny Adawlut, on the Judges observing that, "on the first point, the Judge (of the lower Court) has declared the right of pre-emption to exist under the Hindu law as expounded by Sir W. Macnaghten, the Court however do not find this to be borne out by the Principles and Precedents published by that gentleman. In page 15 of the preface to the Mahomedan Law, it is, on the contrary, stated that the more current authorities of Hindu law are entirely silent on the subject, and after a quotation from a doubtful authority, the passage concludes by observing that it remains yet to be decided, whether it should be held to be practical law or not. Subsequent decisions have, however, shown that the right of pre-emption among Hindus, is recognized by the Courts, when founded on prescriptive usage and local custom, but it has also been ruled (Calcutta Court 25th July 1843), that as the right is derived originally from the Mahomedan law, the rules and restrictions of which are considered even by the Hindus themselves, as applicable to the practice existing among them, the preliminary requisites necessary to sustain a claim of pre-emption, viz. the declaration of an intention, to become a purchaser immediately on hearing of the sale, followed by affirmation of the witnesses of such intention, either in the presence of the seller or the purchaser, or on the premises, must be observed. 7th June 1852. Dec. S. D. A. N. W. P. VII. 227.

40. A Moonsiff having dismissed a suit to establish the right of pre-emptionin consequence of the plaintiffs not having observed the requirements of the Mahomedan law, the Judge decided that the plaintiffs had done their best to comply with the requisition of the law. The Sudder Dewanny Adawlut however ruled, that such was not sufficient; and that the Court must find that the claimants had done what the law requires, or no decree can be passed in their favor. 8th Dec. 1853. Dec. S. D. A. N. W. P. VIII. 769.

41. In a suit instituted by a Mussulmaun against a Hindu to establish the right of pre-emption, to property sold by auction in execution of a decree, held, that, the pre-emption-right supposes an act of volition on the part of the vendor, a principle inapplicable to a transaction of compulsory sale made by any authoritative order, or injunction; and that the incident of a public sale creates a new element beyond the ordinary scope of such right. Claim disallowed. 24th Jan. 1854. Dec. S. D. A. N. W. P. IX. 41.

42. A son, during the life time of his father (who is a coparcener in the village), has not under the Mahomedan law, any right of pre-emption, by virtue of hereditable property to which he has not succeeded. 20th March 1854. Dec. S. D. A. N. W. P. IX. 129.

43. A special appeal being admitted in a suit regarding pre-emption to determine, whether one month only is allowed for the institution of a suit or claim with reference to pp. 48, 187 and 188, Macnaghten's Mahomedan Law, and Note, held, that, "the *exact* period for preferring the claim by litigation is not clearly laid down by the Mahomedan law, wherein some authorities have declared that such claim must be made within one month, while others have ruled there is no limitation. This latter doctrine appears to be the most authentic and generally prevalent opinion. But, before deciding that point, we have to consider whether the limit allowed for the institution of a suit by the regulations, can be restricted by the operation of the Mahomedan law. The question was raised and decided by a full bench of Judges on the 20th March 1845, in the case of Rajah Birjnath Sing, special petitioner, wherein it was ruled, with reference to the authority cited, that a positive enactment, such as that of Sec. 14. Reg. III. of 1793, supersedes the tenets of Mahomedan law as also of Hindoo law; and a claim for possession after the lapse of twelve years, in a suit between Hindoos, to which class the Court held the law was equally applicable, was dismissed. In the case quoted it was sought to set aside the law of limitation, under the plea that adoption, after the lapse of any number of years, was valid under the Hindoo law. The plea, however, was, for the reasons set forth, considered invalid, and the decision was passed on the grounds of the regulation law of limitation. Adopting and applying the principle of the above decision to the case before us, we are of opinion that even if it were a settled point, that, in cases of shoofa, the claim by litigation, under the Mahomedan law, should be preferred within one month, we hold that the law of

limitation, as laid down in Sec. 14, Reg. III, of 1793, cannot be superseded by such restriction. 1st May 1851. Dec. S. D. A. Ben. 292.

NOTE.—Vide Sec. 1, Act XIV. of 1859.

44. Where a prescriptive usage is proved or acknowledged to exist in any locality, such usage of itself is law, binding on all classes to whom the usage has been prescriptively held applicable. It is unimportant whether the usage has given local force to rules of Mahomedan or of Hindoo, or of any other law. *Whatever* has been so established by usage, has become law within the local limits. It is on this principle that the rules of the Mahomedan law of pre-emption have been held to be in force. The Court further observed that, "the claim set up by the Plaintiff (a Hindoo *versus* a Mahomedan) is founded on the right of pre-emption, which is recognized among Hindoos in some parts of the country *on the ground of custom;* it has its origin, however, in the Mahomedan law, the rules and restrictions of which are considered even *by the Hindoos themselves as applicable to the practice as existing among them.*" 8th May 1851. Dec. S. D. A. Ben. 322.

NOTE.—The Defendant (a Mahomedan) objected to the claim of a Hindoo Plaintiff, to obtain a benefit flowing from the Mahomedan law. The decision though brief contains a clear exposition of the usage arising out of the law, among others, than those for whose guidance the law was originally framed.

45. The presentation of a petition to a register of deeds, asserting a right to pre-emption in respect to property, the sale of which to another party had shortly before been registered, cannot be looked upon as *tulb-i-mowasibut,* or a preferment of the immediate claim affirmed by witnesses, required by the Mahomedan law which equally applies although the parties are Hindoos. 23rd May 1855. Dec. S. D. A. N. W. P. 235.

46. The female relatives of the proprietor of a share of an estate, not being included in the coparcenery community, are not co-sharers of such proprietor within the meaning of the *Wajib-ool-urz* of settlement in respect to the right of pre-emption. 10th July 1855. Dec. S. D. A. N. W. P. 390.

47. The pre-emptive-right of a party to purchase a share in one of several villages, sold under a single deed of sale, recognized on its appearing that such party was a shareholder only in the village in which the share claimed was situate. Ib.

48. In the absence of proof that in fixing the price of the share claimed proportionately to what the whole of the villages had been sold for, the claimant of pre-emption had put too low a price on such share, held, that there was nothing illegal in this mode of valuation, and that the question of what was a fair price for the property was properly determinable by the Lower Courts. Ib.

49. Held, that even if it were a settled point that, in cases of *Shoofa*, the claim, by litigation under the Mahomedan law, should be preferred in one month, the law of limitation, as laid down in Sec. 14, Reg. III. of 1793, cannot be superseded by such a restriction. 3rd March 1856. Dec. S. D. A. N. W. P. xi. 189.

NOTE.—Vide Sec. 1, Act XIV. of 1859.

50. A suit between Hindoos was remanded with the following injunction: "The Judge will understand that he is to confine himself to the single point as to whether there is proof of the plaintiff having observed all the legal forms necessary according to the Mahomedan Law on the part of the claimant to the right of pre-emption under that law, whether he be a Mahomedan or a Hindoo." 29th May 1856. Dec. S. D. A. N. W. P. xi. 363.

51. In a suit instituted by a Hindoo Talooqadar, against another Hindoo, the following decision, illustrating a particular distinctive feature in the application of the law of pre-emption, was pronounced. The appellant claims a pre-emptive privilege in the first instance as a sharer in the land sold. This claim cannot be admitted. For the appellant is not a co-sharer in the village. He holds under Government as a Talooqadar, not as a Biswadar or Mokuddum, and neither the agreements made at the time of settlement, nor the law of pre-emption as administered in our Courts, contemplate the concession of pre-emptive rights to mere Talooqadars, whose tenure, though superior, in some respects, to that of the Mokuddum or Biswadar, is inferior in those incidents which constitute proprietorship. The appellant therefore cannot prove his title on the ground of common proprietary interest with the sellers, as his relation to the estate is not identical with their's, and is moreover not such as in itself to convey a pre-emptive right. The Court proceed to consider the *second* plea, namely, the right of pre-emption on account of vicinage. On this point it is sufficient to refer to their decision in the case of Nunkoo Doobé and another *versus* Naryun Doss and others, passed on

this date.* In that decision the reason for refusing to admit the pre-emptive title of a Hindoo claimant to an entire estate on the sole ground of vicinage are fully detailed. It will suffice here to observe that it is not in the opinion of the Court expedient to create this right and that its existence hitherto has not been proved. 23rd June 1856. Dec. S. D. A. N. W. P. xi. 389.

52. * In the absence of any *positive law, established usage and judicial precedent,* the Court refused to recognize the right of pre-emption amongst parties of the Hindoo persuasion, *based on vicinage alone.* 23rd June 1856. Dec. S. D. A. N. W. P. xi. 398.

NOTE.—The following observations respecting the Mahomedan law of pre-emption when claimed by Hindus show that it cannot be administered in all cases. The Court further raised a question (which however was not determined) whether the law on this subject extended among Mahomedans themselves to every description of landed property.

"The right of pre-emption claimed in this case, is founded on ideas taken from the Mahomedan and not from the Hindu law, and carried even further (according to notions so generally prevalent throughout the country, as to amount perhaps to established custom) than the doctrine of the Mahomedan law itself countenances. It is so much recognized that in other suits which have since come before the Court, the defendants though Hindus have admitted the principle on which the pre-emption was claimed, but rested the defence on other ground, such as tender made and refused, before the sale was completed to a stranger. The Mahomedan law allows the right of pre emption to a partner in the property of the land sold, to one participating in the immunities and privileges of it, and to a neighbour." (Hidaya, Book 38. Chap. 1.)

"There can be no doubt that in the Mahomedan law, lands are included amongst the articles concerning which *Shuffa* or pre-emption operates, but it may admit of question whether entire Mehals or estates were intended, or merely parcels of land, gardens and the like. The latter view appears to be supported by a passage in the Hidaya which quotes a saying of the prophet, to the effect that *Shuffa* only affects houses and gardens.

"We are not called upon to determine whether, supposing the parties to have been Mahomedans, the right of pre-emption *based upon vicinage* alone would be legally claimable; but, assuming the right as amongst Mahomedans, whether the parties in the present case being Hindus, that right must necessarily be held to extend to them.

"The Courts have based their recognition of the right of pre-emption among Hindus, first, *on prescriptive usage and local custom* neither of which is shown to exist in regard to the purchase of entire estates—and secondly, *the justice and propriety of the measure to prevent dissension by the introduction of strangers.*"

The suit was instituted to establish the right of pre-emption in respect of an estate and its dependencies, and although the Court decided that *vicinage alone* did not confer such a right on Hindus, it will be remarked, the Judges abstained from expressing an opinion respecting the validity of such a plea, had it been advanced by Mahomedans, in a matter wherein a large estate might form the subject of dispute.

53. Held by the majority of the Court in accordance with a futwa of the Cauzee-ool-Coozat, generally, that in claiming the right of pre-emption of property, if a party in due legal form makes the *tulub-i-moasibat* or immediate demand, some delay in making the *tulub-i-ishhad*, or affirmation by witnesses, prior to the *tulub-i-khasomut*, or claim by litigation is not material, and does not under the Mahomedan law bar the claim to the right of pre-emption. Held further, that the intervention of one day between the immediate demand and the affirmation by witnesses, is not such a delay as to interfere with the Plaintiff's right of pre-emption. 25th March 1857. Dec. S. D. A. Ben. 454.

NOTE.—Macnaghten at page 49, remarks, "it is necessary that the person claiming this right should declare his intention of becoming the purchaser immediately on hearing of the sale, and that he should *with the least practicable delay*, make affirmation by witness of such his intention, either in the presence of the seller or of the purchaser, or on the premises."

The *futwa* of the Cazee-ool-Coozat was as follows: "In order to make the claim of Shafee (right of pre-emption) valid, *tulub-i-moasibat* (immediate demand) on being apprised of the sale is necessary, and in order to give force to that claim tulub-i-ishhad (affirmation by witnesses) is requisite as the claimant of Shafee will have to prove his demand of Shafee before the Judge, and this cannot be accomplished without witnesses, consequently *tulub-i-ishhad* is requisite prior to *tulub-i-khasomut* (claim by litigation), so that *tulub-i-moasibat* on the part of the claimant may be established before the Judge.

"Hence the right of Shafee is not invalidated, if *there occur a delay in the performance of the tulub-i-ishhad* subsequent to the *tulub-i-moasibat* and prior to the tulub-i-khasomut."

The majority of the Court thought this opinion gives greater latitude than the rule cited by Sir W. Macnaghten, but nevertheless did not deem it open to objection. Samuells, J. however, dissented, holding, that the futwa is quite irreconcileable with the principle stated by Macnaghten, and that if such were ruled to be the law of pre-emption, no purchaser of property from a Mahomedan would be safe. He concluded, that "the least practicable delay" is a matter of evidence, and that the Court must decide in each case whether due diligence has been used or not.

54. Held that a party with a title to share in a property though not in possession of his rights, has a right to pre-emption on the ground of coparcenary, and can perform the acts necessary by Mahomedan law, as preliminary conditions to the assertion of his right in a Court of Justice; but he cannot sue for the enforcement of that right, until his original title, which is the ground of the right to pre-emption, be itself unquestioned, and until the possession adverse to that title be removed by a decree of the Civil Court. 31st March 1857. Dec. S. D. A. Ben. 525.

55. Held further, that on looking to the right of pre-emption itself, the Court must be guided entirely by Mahomedan law; but that in considering questions regarding the mode and time at which that right is to be demanded and enforced, the regulation law of procedure, must be followed, and under this law, a derivative right cannot be asserted, until the original title whence it flows is itself clear and unquestioned. Ib.

56. Held, that it appears to the Courts, that the right of shafee, to be proclaimed by another on the part of the possessor of the right in his absence, cannot be delegated. 2nd July 1857. Dec. S. D. A. Ben. 1172.

NOTE.—In this case, the agent without previous communication with the claimant, and consequently without any sort of authority from him, came forward and proclaimed to the purchaser, that the plaintiff intended to claim his right. The Court were of opinion that under no circumstances could an act so unauthorized be recognized as sufficient, and that the claim should have been dismissed on this ground alone.

57. A decree in favor of a party who sued for the right of pre-emption, stipulating that he should lodge the purchase money within a month, or lose all advantages under the decree, declared inoperative on failure of observance of the condition. 30th July 1857. Dec. S. D. A. Ben. 1395.

58. Decree of the Lower Court dismissing Plaintiff's claim for pre-emption, because, although he had adopted the preliminary precautions he had failed to sue for five years, held not to have been passed on a legal ground. Case remanded. 24th Feb. 1858. Dec. S. D. A. Ben. 305.

59. In a case of pre-emption between Hindoos it was ruled that, there can be no doubt that the right of pre-emption under Mahomedan law does not apply to *movable* property. The right extends to houses of every sort thatched as well as those which are not thatched. The restricting of the right only to those houses which cannot with ease be taken to pieces, would be in consonance neither with the letter nor the spirit of Mahomedan law. 21st April 1858. Dec. S. D. A. Ben. 771.

60. The following rule laid down in Macnaghten, page 192, on the authority of the Hedaya was declared applicable to a case in point: "Where there is a plurality of persons entitled to the privilege of Shoofaa, the right of all is equal, and no regard is had to the extent of their several properties." 1st Dec. 1858. Dec. S. D. A. Ben. 1755.

NOTE.—The claimants held unequal portions in certain property, and it was contended, that the property in which the right of pre-emption was claimed, should be divided in proportion to their respective shares.

61. In a case of pre-emption it appeared that the claimant on hearing of the sale, without adopting the other preliminary steps, immediately proceeded to the vendor's house to offer the money; held, this is insufficient to fulfil the requirements of the law of Shuffa or pre-emption, and that the party is not entitled to the preference he claims. 16th Feb. 1859. Dec. S. D. A. Ben. 151.

62. The Lower Court threw out a suit for pre-emption which had been instituted eight years after the cause of action arose on the ground, that the Mahomedan law of Shuffa requires, that a claim for pre-emption shall be preferred without delay. Held, in appeal, that the limit allowed for the institution of a suit by the Regulations cannot be restricted by the operation of the Mahomedan law. 20th April 1859. Dec. S. D. A. Ben. 464.

63. Held, that an individual who merely holds land on sufferance without any fixity of tenure, does not possess the right of pre-emption. 2nd June 1859. Dec. S. D. A. Ben. 714.

NOTE.—The claimant appears to have been an under tenant.

RELINQUISHMENT OF CLAIM.

1. Renunciation of inheritance in the time of the ancestor is null and void, and a claim to it may be preferred at any subsequent period without limitation. 13th Feb. 1827. 4 S. D. A. Ben. Rep. 210.

2. For a case of fraudulent renunciation of inheritance, vide Inh. 89, wherein the law relative to the liability of Mahomedan heirs is expounded.

SALE.

Vide Tit. MORTGAGE 1, 2, 3, 4, 5.

1. The sale by a Mussulmaun of his children's lands, he having declined the guardianship of them, was held to be null and void, and he was directed to refund the purchase money, with interest, with liberty, however, to sue his children for the recovery of the money if it were expended for their benefit. 24th August 1820. 3 S. D. A. Ben. Rep. 49.

NOTE.—It does not appear whether the father had recourse to this measure. If he had, it would have been necessary for him to prove that the debt was necessary for the support or education of the children (See Macn. Prin. 69 R. 11) and for the circumstances under which the sale of landed property is legal, See Do. 70 R. 14. That however did not come into question in the present suit, as the father had expressly declined the guardianship of his children's property; and the sale of it therefore could not under any circumstance have been legal. Macn.

2. A Mussulmaun cannot sell land belonging to his wife against her will, and without her concurrence; but when the husband sold a portion of land belonging to his wife, and she subsequently sold the same land to another individual, the first sale was upheld, the wife, under the circumstances of the case being presumed to have been a consenting party. 21st August 1827. 4 S. D. A. Ben. Rep. 259.

3. Where a Mahomedan woman in exchange for a champikali, or necklace gave half of her property to another person, on condition that the latter should not alienate it, but leave it on her death, to two individuals named in the deed of conveyance; it was held, that the transaction being a gift for a consideration, was according to Mahomedan law in reality a sale; that the conditions of the sale were not binding; and that on the death of the vendee the property would descend to her heirs to the exclusion of the persons in whose favor those conditions were made. 5th Feb. 1829. 4 S. D. A. Ben. Rep. 334.

4. Where a father, a Mussulmaun, by two separate deeds had sold all his property to his son, and made over to him the purchase money as a free gift, it appearing that the provisions of the contract had never been carried into effect, and that the sale was invalid under the Mahomedan law, as being of the kind denominated *Bay-i-Tuljiah,* it was held that the sale was invalid. 5th April 1828. 4 S. D. A. Ben. Rep. 307.

5. A sale of the nature called *Bay-i-Tuljiah,* to which effect has not been given, and which was clearly intended to serve a temporary purpose, is invalid in regard to the transfer of property under such sale. 25th April 1839. 6 S. D. A. Ben. Rep. 257.

NOTE.—A *Tuljiah* sale is thus explained by the author of the *Nur-ul-Anwar.* In explaining the circumstances which bar the competency to contract, he mentions, among others, *Huzl,* or jesting; and under that head remarks, "Tuljiah means forcing, and may be defined to mean the straining of a contract, so as to produce a different result from what it outwardly bears; so that the parties appear to the world to execute a sale for some purpose which calls for it, whilst in fact no sale takes place between them. *Huzl* is a more comprehensive term, but the rule regarding both is the same; viz. that competency is conditional, and not necessarily destroyed. *Huzl* consists in this, that the contractors secretly agree that they should apparently execute a sale before men, whilst in reality no contract is formed. Should they after such contract apparently made, differ regarding the previous agreement, one party holding that the contract was fictitious, and the other that it was *bonâ fide,* the correct opinion is, that the presumption is in favor of the former, and the sale is to be annulled. Vide *Nur-ul, Anwar,* p. 351, Calc. Ed. of 1818. Morley.

6. A sale by the real proprietor of certain lands was upheld as valid and binding, though his name had never been recorded in the Collector's books as proprietor, and though the property continued to be registered in the name of one of the seller's relations for some time after the sale. 7th Aug. 1823. 3 S. D. A. Rep. Ben. 258.

7. In the absence of a bill of sale for landed property, and a receipt for the purchase money, the Court held it necessary that the fact of the sale should be satisfactorily established; and in the present instance, considered the proof adduced by the claimants (who was a servant of the alleged vendor, and probably in possession of his seals) to be insufficient to establish the sale disallowed the claim. 27th June 1826, 4 S. D. A. Ben. Rep. 168.

8. A *bonâ fide*, sale in which the seller relinquishes all claim to the purchase money, is valid. 8th March 1848. S. D. A. Dec. Ben. 141.

9. The want of possession in the person of the seller does not vitiate the sale of immovable property. 13th May 1848. S. D. A. Dec. Ben. 448. 13th May 1848. S. D. A. Dec. Ben. 450.

10. A vendor receiving part of the purchase money, and promising to conclude the sale on payment of the remainder, is bound to complete the sale on tender of such balance. 3rd June 1848. S. D. A. Ben. Dec. 499.

11. A deed of sale may be partly good and partly bad, according as circumstances may raise presumptions for or against the separate titles conveyed by it. 31st July 1847. S. D. A. Dec. Ben. 377.

12. A deed of sale of real property, for a specified consideration, although with the avowed object of enabling the seller to prosecute a claim at law, was held, under the circumstances, not to be invalidated by the vendor not being in possession. 13th May 1848. 7 S. D. A. Ben. Rep. 495.

13. Possession of a house by a purchaser gives him a preferable claim to a prior mortgagee who has never been in possession. Nov. 1835. Sel. Rep. 165. S. A. Bom.

14. Held, that a sale of land may under some circumstances, be adjudged to be complete, and consequently to be such a transfer

that a decree can be given to the purchaser for the land sold, although the deed of sale which evidences the conveyance, may not have been delivered to the purchaser. 9th July 1849. 4 Dec. S. D. A. N. W. P. 210.

NOTE.—In this case, the Court observed—"The Court are of opinion that in these provinces the delivery of the deed which evidences the transfer cannot be peremptorily held to be a necessary condition to the perfectness of the conveyance. They believe that such a rule would be conformable with the English law, and also, that, if it were once established, the most beneficial consequences would be felt; but at the same time there are considerations which deter the Court from pronouncing, as law for the future, that every conveyance is *inchoate* and imperfect, until the deed which evidences the transaction has been delivered." The practice of the Courts appears to have been regulated by the provisions of the Mahomedan law, although the Courts are not required to attend to such law in cases of contract. Under that law the delivery of a deed is not necessary to the validity and perfectness of a sale of land; but neverless the Judge should form his opinion upon the merits of each case, as he thinks just and equitable. This view of the practice is supported by the case of Meerza Moohummud Ali *v.* Nawab Soulut Jung. 4 S. D. A. Ben. Rep. 168.

15. In a suit respecting some land, between a party who claimed by inheritance, and another who claimed by purchase, it was held that by Mahomedan law, possession, with oral evidence of conveyance, gives a valid title in the absence of a written instrument. 3rd Sept. 1851. Morris' Sel. Rep. S. A. Bom. 76.

16. In this case the Court expressed a doubt whether under the Mahomedan law, delivery of a deed (of sale) at the time of execution, and of signature of witnesses, is essential to the validity of a bye-mokasa, or indeed of any sale; but no decision was pronounced. 25th Aug. 1852. Dec. S. D. A. Ben. 858.

17. In a suit for recovery of property sold by the heir, the widow of the deceased claimed dower; held, that claim on the ground of dower takes precedence of all claims by inheritance; consequently, the heir had no power to transfer the property by sale till he had first paid the dower; and the claim by virtue of sale from him must be held contingent on the fact that the claim of the widow for dower has been satisfied. The plaintiff therefore, cannot claim possession under the deed of sale till he has first paid the dower. 2nd September 1852. Dec. S. D. A. Ben. Rep. 885.

18. The power of a Mahomedan, although not in possession to sell his right recognized. Ib.

19. The sale of Wuqf, or strictly endowed property, is, under Mahomedan law illegal. But property, not strictly Wuqf, but

heritable, though subject to certain trusts, is capable of sale, so far as it is heritable. 1st July 1858. Dec. S. D. A. Ben. 1218.

NOTE.—For the distinction between these two descriptions of property. Vide Nos. 58, 59 and 60. Tit. End.

SHADEE.

Vide MARRIAGE, NOTE TO CASE 18.

SLAVERY.

1. The marriage of a Mussulmaun with his slave girl is of no effect in law. 20th July 1801. 1 S. D. A. Ben. Rep. 48.

2. A girl had been purchased, when an infant, from her parents by a prostitute; and having been educated in the courses, and for a long time followed the disreputable practices of her mistress, at length agreed to marry a respectable person, promising to relinquish her unlawful occupation. Accordingly, she left the house of her mistress, and proceeded to that of the individual above mentioned. The prostitute who had purchased her, and who, of course, dreaded considerable loss of profit from her departure, petitioned the Magistrate of Furruckabad to compel her to return, with which request that officer, from a mistaken notion of duty, complied. On appeal from the above order, it was held that the claim of the prostitute rested on no legal foundation whatever; that a child purchased in its infancy was at full liberty, when of mature age, to act as best suited its inclination; and that it was even a duty incumbent on the Magistrate to punish any attempt at compelling adherence to an immoral course of life. 1816. Anon. 3 S. D. A. Ben. Rep. 142.

3. A legal right to the service of another person can only arise to a Mussulmaun, when the party claimed as a slave, or his progenitor, was an infidel captive to a Mahomedan force, prevailing in holy war. 28th Aug. 1830. 5. S. D. A. Ben. Rep. 59.

4. The Sudder Dewanny Adawlut is prohibited by Sec. 2 of Act V. of 1843, from enforcing any rights arising out of an alleged property in the person and services of another as a slave. 28th Feb. 1845. S. D. A. Dec. Ben. 40. 27th March 1845. S. D. A. Dec. Ben. 82.

STEP-SON.

1. Held, there is no provision of the Mahomedan law, requiring that an individual should maintain his widowed step-mother, there being between the two no tie of consanguinity to call for such act of maintenance. 3rd Sept. 1853. Dec. Mad. S. A. 199.

TAWLIYAT.

1. *Tawliyat* implies the consignment of a thing appropriated to pious uses by the appropriator to another person, for the purpose of such person's applying it in the manner designed; and the appointment of the trustee or superintendent is vested in the appropriator, in order that he may confer the office on a person of integrity, morality, information, and economy; and on the death of the appropriator the power of appointing a Superintendent is vested in his executor, or, should he have left no executor, in the ruling power. 6th Dec. 1798. 1 S. D. A. Ben. Rep. 17.

TRUST AND TRUSTEE.

1. The Court refused to allow a trust for the support of a *Masjid* to be handed over to the official trustee. 13th Dec. 1843. 1 Fulton 342. Sup. Ct. Cal.

2. A decree which committed part of the estate of an absent Mussulmaun to his sister, with a provision for eventual conversion of tenure by trust into that of property, was reversed by the Sudder Dewanny Adawlut, no eventual heritable right being found in the case to exist in the sister. 15th Apr. 1831. 5 S. D. A. Ben. Rep. 108.

WALL.

1. In a suit instituted by Mahomedans against a Hindu, held, that an action will lie to build up the wall of Defendant's house to the height needed, for abatement of the injury (destruction of privacy) sustained by Plaintiffs from being overloooked. Decision in favor of Plaintiffs by the majority of the Court. Begbie, J. dissented, holding, that damages only should be awarded. 13th March 1855. Dec. S. D. A. N. W., P. 93.

WAZIFAHDAR.

1. An under *Wazifahdar* in a village was held to be entitled to the management of his own share of the *Wazifah* lands, taking it out of the hands of the head or managing Wazifahdar. 20th May 1814. 1 Borr. 116.

NOTE.—Wazifah means lands assigned for the payment of a pension or stipend.

WIDOW.

1. Where the widow of a Mussulmaun had not derived any property from her late husband, she was held not to be liable for his debts. 6th June 1826. 4 S. D. A. Ben. Rep. 161.

2. Held, there is no provision of the Mahomedan law, requiring that an individual should maintain his widowed step-mother, there being between the two no tie of consanguinity to call for such an act of maintenance. 3rd Sept. 1853. Dec. Mad. S. A. 199.

WILL.

1. Though the appointment of other than a Mussulmaun as executor to the will of a Mussulmaun is legal, yet it is incumbent on the Kazi to eject him from being executor; and where a Hindu was appointed executor to a Mussulmaun, it was declared that the whole of his official acts were valid, until he should be regularly displaced by the Kazi. 31st March 1825. 4 S. D. A. Ben. Rep. 49.

2. The appointment by a Mussulmaun, of a Christian as his executor does not invalidate a will containing such a provision; nor does the death of that executor, and the failure of the testator to appoint another in his place, imply the annulment of the will. 28th Jan. 1828. 4 S. D. A. Ben. Rep. 301.

3. A Mussulmaun woman may make a will either in writing or by parol, disposing of her property to a stranger, though she have a natural son by a Christian, which son, being bred up a Christian, cannot of right inherit her property. In the goods of Beebee Hay. 3rd Term 1819. East's Notes, Case 105, Sup. Ct. Cal.

NOTE.—The Mahomedan law, with regard to wills of Mussulmauns, is acknowledged in all the Courts in India. Morley.

4. A Mussulmaun cannot make a bequest in favor of some of his heirs to the exclusion of others, without the consent of such other heirs. Case 1 of 1820. 1 Mad. Dec. 254.

5. Where a Mahomedan widow bequeathed by will the whole of her property to a stranger, the Court upheld the will, as the testatrix left no heirs, and decreed that the legatee should take the whole of the property; but it was at the same time decided, that had she left objecting heirs, two-thirds of the property would have gone to them, and one to the legatee. 31st March 1825. 4 S. D. A. Ben. Rep. 49.

6. Legacies by the Mahomedan law, are limited to one-third of the testator's property, exclusive of funeral charges and debts, the remaining two-thirds not being alienable by will from the heirs at law. 8th Aug. 1806. 1 S. D. A. Ben. Rep. 150.

7. And the heirs of a Mussulmaun deceased were held to be entitled to recover two-thirds of his estate from the widow of his executor. Ib.

8. A Mahomedan *Fakir* having appointed a person his *Janishin*, or successor, with the apparent intention of bequeathing to him his estate; it was held that the bequest was good to the extent of one-third of his estate, the other two-thirds going to the legal heirs of the deceased. 11th Sept. 1811. 1 S. D. A. Ben. Rep. 346.

9. A Mahomedan cannot by his will vary the legal proportions of his estate to be shared by his heirs and relations, although as between heirs and relations he may in his life time give the whole or any part to any whom he may prefer. 24th Dec. 1817. East's Notes, Case 67, Sup. Ct. Cal.

10. But semble, a Mahomedan may by will give the whole or any part of his estate to a stranger.* Ib.

11. A will made by a Mussulmaun in favor of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons, or the other heirs. 25th April 1837. 6 S. D. A. Rep. 159.

12. A verbal bequest of property real or personal, is valid by the Mahomedan law so far as a third of the property of the bequeather, two-thirds falling necessarily to the heirs at law. 9th Aug. 1799. 1 S. D. A. Ben. Rep. 25.

13. If a Mahomedan assign property for a pious endowment, and he (or his executor on his part) appoint a trustee, and such trustee (there being no special provision for his successor) on his death bed bequeath the trust to his sons, the bequest is good in law; and the sons are entitled to the superintendence jointly, and to the lawful profits accruing from it, not subject to the confirmation of the ruling power, neither are they removable *quamdiu*

NOTE.—* If he has no heirs. Vide Case 5.

se bene gesserint; but on proof of misconduct, or breach of their trust, the ruling power shall appoint another or others in their stead. 6th Dec. 1798. 1 S. D. A. Ben. Rep. 17.

14. The assent of the heirs, after the death of the testator, is necessary to the validity of the will of a Mahomedan, bequeathing from them more than a certain proportion of his property. 2nd Aug. 1814. 2 Str. 269, Sup. Ct. Cal.

15. And a defendant pleading in bar to a bill a will, stating that all the members of the family had assented to it, but without showing how, such will was held to be questionable by the Court, and was withdrawn by the defendant. Ib.

16. A widow of a Mahomedan claiming half of a house devised to her by her husband in his will, beyond the share belonging to her by law, was held to be entitled to it notwithstanding a *Furikh khatt* passed by her, there being no dispute at the time of passing the *Furikh khatt*, the widow then residing on the premises, and it therefore only pertaining to the share willed to the widow as one of the joint heirs of her husband; and although the Mahomedan law does not allow bequests, made as such under a will, to heirs, yet it was held to recognize Nazrs, or gifts similar to that recited in the will; and as there was no proof that the widow ever transferred her right by giving it up to be divided among the heirs, nor that she in any way legally allienated it, she was held to be clearly entitled to recover. 5th July 1820. 1 Borr. 306. Bom. S. A.

17. A testament of a Mussulmaun was declared null under the Mahomedan law, because he had made a partition among his heirs, giving some a preference, which the law would not allow. 4th April 1833. 5 S. D. A. Ben. Rep. 257.

18. The question whether a will has been properly executed by a Mahomedan testator must be tried by the English and not by the Mahomedan law of evidence. 19th Jan. 1813. 2 Str. 180.

NOTE.—Of course this decision refers only to the practice in the Supreme Courts, and not to that in the Courts of the Honorable Company. Morley. Act II. of 1855, is now the Law of Evidence throughout India.

19. A nuncupative will by a Mahomedan of the *Shia* sect, bequeathing property, less in amount than one-third of his estate, held valid by the Mahomedan law, and effect given to the bequests.

Semble. Such verbal bequests would have been valid, even if beyond a third of the testator's estate, provided the heirs concurred in the bequests. 21st June 1851. Moore's Ind. App. Cases, V. 199.

20. The genuineness and validity of deeds executed by a deceased person as to the disposition of his property real and personal, can only be questioned in a regular suit. The lower Court is not competent to pronounce an opinion upon the validity or otherwise of the will in a summary enquiry. 11th July 1856. Sheik Muksood Ali. Petr. Case 103. Sev. S. D. A. Ben. Rep. IV. 241.

21. One Gholaum Hoossein having died childless, his concubine applied for a certificate under Act XX. of 1841, alleging that she had been *verbally* constituted his heir. It was ruled, that the Courts of this country cannot recognize any right, as preferred for the collection of debts due to a deceased person alleging that the deceased had *orally* stated that she (his concubine) was his heir. The order of the Zillah Judge was therefore confirmed. 8th Dec. 1856. Case 168. Sev. S. D. A. Ben. Rep. IV. 419.

22. A guardian of a minor having been nominated by will, the Zillah Judge has no authority to interfere. His order inviting candidates for the office of guardian, reversed in summary appeal preferred to the Sudder Dewanny Adawlut. 30th April 1858. Mahomed Alif Chanduree, Petr. Case 44. Sev. S. D. A. Ben. Rep. V. 119.

23. A party having acquiesced in the disposal of property by will, cannot claim the benefit of that provision of Mahomedan law, which declares a devise to be invalid unless the consent of the heirs has been obtained. 21st April 1851. Dec. S. D. A. N. W. P. VI. 127.

24. According to the *futwa*, the *Sheeas* may devise one-third of their property even without the consent of the heirs, whereas the *Soonnees* do not enjoy this privilege. Ib.

25. The will of a Mussulmaun containing an absolute devise in favor of A, subject to certain trusts and a life interest of B in the surplus profits of the property, held to be valid, notwithstanding the postponement of the enjoyment of the usufruct of the property, which was declared not to hinder the vesting of the property in A. 21st Feb. 1857. Dec. S. D. A. Ben. 235.

WINDOWS.

1. By the Mahomedan law a person cannot open new windows in the side of a house overlooking his neighbour's land, nor construct new projections over it, nor allow rain water to drop upon such land where it had previously been carried off by another channel. 12th May 1819. 1 Borr. 246, Bom. S. A.

NOTE.—The Law Officer in this case gave as the authority for the opinion the *Nisab-ul-Hisab.* Morley.

NOTE.—It was decided by the Madras Sudder Adawlut, in S. A. S. No. 80 of 1844, (Vol. 2, page 84), wherein the respondent was a Mussulmaun, that a party cannot be restrained from opening windows in an upstair room recently constructed, notwithstanding that they interfere with the comfort and convenience theretofore possessed by the owner of the adjacent houses.

2. But though a person has no right to open new doors and windows overlooking another one's property, he may raise the roof of his own house as high as he pleases. 1st Oct. 1811. 1 Borr. 381, S. A. Bom.

3. The decision of the Moonsiff (which had been reversed in appeal), recognizing the principle that every man has a right to open as many windows in his house as he chooses, upheld in special appeal. 26th Feb. 1857. Dec. S. D. A. N. W. P. 85.

TABLE OF TERMS OF RELATIONSHIP.

The following Table of the Terms of the different degrees of affinity is taken from the Qanoon-i-Islam.

A man's *Paternal Relatives or Ŏwlad.* اولاد

Father,	باپ			
Father's brother (elder,)	تايا	his	wife,	تاي
			son,	تايرابهاي
			daughter,	تايري بهن
Father's brother (younger,)	چچا	his	wife,	چچاني
			son,	چچيرابهاي
			daughter,	چچيري بهن
Father's sister,	پهوپهي	her	husband,	پهوپها - پهوپهو
			son,	پهپهيرابهاي
			daughter,	پهپهيري بهن
Father's father,	دادا			
Father's mother,	دادي			
Father's father's father,	پردادا			
Father's father's mother,	پردادي			

A man's *Maternal Relatives, or Al.* آل

Mother,	ما - مان			
Mother's brother,	مامو	his	wife,	مماني
			son,	مومیرابهاي
			daughter,	مومیري بهن
Mother's sister,	خالا - خاله	her	husband,	خالو - [illegible]
			son,	خليرابهاي
			daughter,	خليري بهن
Mother's father,	نانا			
Mother's mother,	ناني			
Mother's father's father,	پرنانا			
Mother's father's mother,	پرناني			

A man's				
Brother,	بهاي	his	wife,	بهاوج
			son,	بهتيجا
			daughter,	بهتيجي
Sister,	بهن	her	husband,	بهوناي
			son,	بهانجا
			daughter,	بهانجي
Son,	بيٹا	his	wife,	بهو
			son,	پوترا - پوتا
			daughter,	پوتري - پوتي
Daughter,	بيٹي	her	husband,	داماد - جوائي
			son,	نواسا
			daughter,	نواسي - نتني - ناتي

Grandson, Grand-daughter, } Vide above, son's son and daughter, and daughter's son and daughter.

Great grandson, پرپوتا - پرپوترا

Great granddaughter, پرپوتي - پرپوتري

A man's							
Wife, جورو	her	father,	سسرا - سسر				
		mother,	خوشدامن - ساس				
		brother,	سالا	his	wife,	بهاوج
					son,	بهتيجا
					daughter,	بهتيجي
		sister,	سالي	her	husband,	سارو
					son,	بهانجا
					daughter,	بهانجي

A woman's			
Husband, خصم	his	father,	سسرا - سسر
		mother,	خوشدامن - ساس
		brother, elder,	جيٹه - his wife جيٹهاني
		brother, younger,	ديور - ديوڑا - ديوڑها
		his wife,	ديوراني
		sister,	نانند

NOTE.—Dr. Herklots says, No peculiar epithets are known for other degrees of affinity.

FOR THE SAKE OF EASIER REFERENCE THE PRECEDING LIST IS ARRANGED BELOW IN ALPHABETICAL ORDER.

Bap,	باپ	father.
Bayta,	بيٹا	son.
Baytee,	بيٹي	daughter.
Bhaee,	بهاي	brother.
Bhanja,	بهانجا	sister's son (or wife's sister's son.)
Bhanjee,	بهانجي	sister's daughter (or wife's sister's daughter.)
Bhawuj,	بهاوج	brother's wife (or wife's brother's wife.)
Bhow-naee,	بهونائي	sister's husband.
Bhuteeja,	بهتيجا	brother's son (or wife's brother's son.)
Bhuteejee,	بهتيجي	brother's daughter(or wife's brother's daughter.)
Buhoo,	بهو	son's wife.
Buhun,	بهن	sister.
Chu-cha,	چچا	father's younger brother.
Chu-chanee,	چچاني	father's younger brother's wife.
Chu-chayra bhaee	چچيرا بهاي	father's younger brother's son.
Chu-chayree buhun,	چچيري بهن	father's younger brother's daughter.
Dada,	داده	paternal grandfather.
Dadee,	دادي	paternal grandmother.
Damad داماد or Juwanee,	جواني	mother's daughter's husband.

Daywur,	ديور	husband's younger brother.
Daywura,	ديوڑا	
Daywurha,	ديوڑها	
Daywuranee,	ديوراني	husband's younger brother's wife.
Jayth'	جيٹهہ	husband's elder brother.
Jay'thanee,	جيٹهاني	husband's elder brother's wife.
Joroo,	جورو	wife.
Juwanee, جواني or Damad داماد		daughter's husband.
Khala,	خالا	mother's sister.
Khaloo خالو or Khulaee, خلائي		mother's sister's husband.
Khooshdamun,	خوشدامن	wife's or husband's mother.
Khulayra bhaee,	خليرا بهاي	mother's sister's son.
Khulayree buhun,	خليري بهن	mother's sister's daughter.
Ma ما or Man,	مان	mother.
Mamoo,	مامو	mother's brother.
Momanee,	مماني	mother's brother's wife.
Mowlayra bhaee,	موليرا بهاي	mother's brother's son.
Mowlayree buhun,	موليري بهن	mother's brother's daughter.
Nana,	نانا	maternal grandfather.
Nanee,	ناني	maternal grandmother.
Nanud,	نند	husband's sister.
Natee ناتي o Nutnee,	نتني	daughter's daughter.
Nuwasa,	نواسا	daughter's son.
Nuwasee,	نواسي	daughter's daughter.
P'hoopa or P'hoop'ha,	پهوپا- پهو پها	father's sister's husband (or uncle.)
P'hoopoo or P'hoo'phoo,	پهوپو-پهوپهو	

P'hoopee,	پهوپي	father's sister.
P'hoop'hee,	پهو بهي	
P'hoopayra bhaee,	پهوپيرا بهاي	father's sister's son.
P'hoopayree buhun,	پهو پيري بهن	fathers sister's daughter.
Pota, پوتا or Potra,	پوترا	son's son.
Potee پوتي or Potree,	پوتري	son's daughter.
Pur dada,	پرداده	paternal great grandfather.
Pur dadee,	پردادي	maternal great grandmother.
Pur nana,	پرنانا	maternal great grandfather.
Pur nanee,	پرناني	maternal great grandmother.
Pur pota, پرپوتا or Pur potra,	پرپوترا	great grandson.
Pur potee,	پرپوتي	great granddaughter.
Pur potree,	پرپوتري	
Sas,	ساس	wife's or husband's mother.
Sala,	سالا	wife's brother.
Salee,	سالي	wife's sister.
Saroo,	سارو	wife's sister's husband.
Sasur, سسر or Soosra,	سسرا	wife's or husband's father.
Taee,	تائي	father's elder brother's wife.
Taeea,	تايا	father's elder brother.
Taeera bhaee,	تايرابهاي	father's elder brother's son.
Taeeree buhun,	تايري بهن	father's elder brother's daughter.

DESCRIPTION OF THE NIKAH,

OR

MAHOMEDAN MARRIAGE CEREMONY.

COLLECTED FROM THE QANOON-I-ISLAM.

Neekah, agreeably to the sacred Qoran, and the Huddees-i-Nubuwee (prophetical traditions) depends on three things: 1st. The consent of the man and woman; 2ndly. The evidence of two witnesses; 3rdly. The settling a marriage portion on the wife.

Men of property usually pay the whole, or sometimes a third of the dowry at the time of the marriage, while the poor pay it by instalments.

The ceremony of Neekah is in general performed by Qazees who have been appointed solely for the advantage of the ignorant and uneducated; men of science, however, who can exercise their own judgment, have no occasion to have recourse to the services of a Qazee. Being masters in their own families, they can solemnize* matrimony and perform the funeral obsequies, &c. themselves, against which there is no prohibition either by God or the Prophet.

Although it is usual to remunerate the Qazee, he is not entitled, by right, to demand a fee for the performance of the Neekah ceremony. In fact it is considered not only improper and unbecoming, but also unlawful in a Qazee to exact a fee from a Mussulmaun who wishes to enter into so lawful an engagement, sanctioned by the precepts of Mahomed.

Before the performance of the ceremony the Qazee appoints two individuals as witnesses on the side of the bridegroom, and desires them to proceed to the bride's party and request them to issue orders regarding the Neekah, and to state the nature of the marriage portion.

The dowry is generally fixed in proportion to that which other females of the bride's family may have received, and after the amount has been settled, the Qazee asks the bridegroom, whether he is satisfied, and on his replying in the affirmative, proceeds to perform the service.

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* Vide on this subject Macnaghten's Preliminary Remarks, p. XXV.

In the first place, the Muqna and Sayhra (veils which cover the face of the bridegroom), are thrown over his head, and he is made to gargle his throat three times with water. After which, he is seated with his face turned towards the qibla, and desired to repeat after the Qazee in Arabic: I. The Ustugfar (deprecation); II. The four qools (Chapters in the Qoran, commencing with the word qool, i. e. "say," viz. the 109th, 112th, 113th and 114th). III. The five Kulmay (Creeds); IV. The Sift-e-eeman (Articles of belief), viz. Belief, 1st, in God; 2nd, in his Angels; 3rd, in his Scriptures; 4th, in his Prophets; 5th, in the Resurrection and day of Judgment; and 6th, in his absolute decree and predestination of good and evil. V. The Doa-e-qoonoot (prayer of praise). If the bridegroom be illiterate the Qazee explains the meaning in Hindoostany.

The Qazee then makes the bridegroom repeat after him in Arabic the Neekah ka Seega or marriage contract, and points out its signification. After which he desires the Wukeel and bridegroom to join hands, and directs the former to say to the latter, "such a one's daughter, such a one, by the agency of the Wukeel, and the testimony of two witnesses, has, in your marriage with her, had such a jointure settled upon her: do you consent to it"? The bridegroom replies, "with my whole heart and soul, to my marriage with this lady, as well as to the above mentioned settlement made upon her, do I consent, consent, consent"!!!

After this the Qazee offers up a supplication to heaven on behalf of the newly married pair saying, "Oh great God! grant that mutual love may reign between this couple, as it existed between Adum and Huwa (Adam and Eve), Ibraheem and Sara (Abraham and Sarah), and such affection as was between Yoosoof and Zuleekha (Joseph and Potiphar's wife), Moosa and Sufoora (Moses and his wife Zippora), his highness Mahomed Moostuffa and Aaysha, and his highness Ally-ool-Moortooza and Fateema-ooz-Zohura."

Having finished, the Qazee helps himself to the contents of a tray which is placed before him, and having blown on the sugar-candy, puts a small bit into the mouth of the bridegroom and delivers the pote (or glass beads) and a little sugar-candy to the bridegroom's mother, or any other near relative, desiring him to convey them to the bride, and to tell her that she must henceforth consider herself married to such a person, the son of such a one; that such a jointure has been settled upon her; and that she is to chew the sugar candy as emblematic of the sweets of matrimony, and wear the necklace in token of her marriage.

Thus ends the ceremony. After it is over, the bridegroom falls on the necks of his friends, kisses their hands and receives their congratulations. A slave even on such an occasion is allowed to embrace all the gentlemen present.

Neekah is preceded and followed by festive rejoicings, an account of which is omitted as they are not essential to the validity of the contract. When a widow marries, the Neekah ceremony alone is performed, and the shadee or rejoicings are dispensed with.

Although it is in strictness considered unlawful in a Qazee to demand a fee, nevertheless custom has provided for him certain voluntary offerings which are never withheld. These are put on a tray which is placed before the Qazee during the performance of the ceremony, and generally consist of sugar-candy, dried dates, almonds, beetel leaves, and two and a quarter rupees. Sometimes a seer, or a seer and a quarter of raw rice, some sandal in a cup, with a pote ka luch-chha (necklace of two strings of black beads), a suit of clothes, a shawl, and other articles, are added, according to the means and inclination of the persons married and their friends.

DIVORCE.

BY AMIR-BA-YED, OR DELEGATION OF LIBERTY.

The following decision of Mr. C. R. Baynes, late Civil Judge of Madura, and subsequently Puisne Judge of the Madras Sudr Udalut, passed on the 34th December 18›1, relates to the doctrine of "Delegation of Liberty of Divorce" described at page 249 of the 1st Volume of the Hedaya, under the title "Amir-ba-yed." It is the only decision on the subject which I have seen, and as it appears to be strictly in accordance with Mahomedan law is entitled to attention. The judgment was evidently based on passages in the Hedaya, to which however reference was not made in the original, but the omission has been supplied by notes.

The Plaintiff sued for recovery of dower alleging that she had been divorced by her husband, the 1st Defendant's saying to her "Mind your own business, you shall not be governed by me in future."

The 1st Defendant denied having divorced the Plaintiff, and expressed a wish that she should return to live with him.

The Moofty Sudr Ameen (Mahomedan law officer of the Court) at first dismissed the suit, being of opinion that plaintiff, according to her own showing, had no case; and, on review, after reception of evidence, and entering into a full exposition of the law, adhered to his original decision.

In appeal, Mr. Baynes, Civil Judge, pronounced judgment as follows:

Divorce, *talak*, under the Mahomedan law may be "express" sareek, or by "implication" kinayat.*

Express divorce may be of two kinds:

1st. When the husband, using one of the legal formulas prescribed for such occasion, and which are explicitly declared not susceptible of other meaning or interpretation, pronounces his wife divorced, and directs her to observe her "edit," or that period of separation from him, which would enable her to marry another.

2nd. When by similar expressions he makes a "delegation of divorce," tafweez al talak, or gives his wife an "option" or "liberty" of divorcing herself.

Divorce by implication "is that in which the husband uses, for either of the above purposes, expressions which *may* constitute or effect divorce, but which the law allows him to explain, or affix a different meaning to, at his pleasure, or according to circumstances.

The "express" terms are few and precise: one, to be employed by the husband when himself divorcing; two, when allowing his wife to divorce herself, viz.

1. Injunction of "separation," "Edit."
2. Permission of "choice," "iktiyar."†
3. Declaration of "liberty," "Amirke-ba-yed-ke," and each of these have several corresponding terms of "implication."

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* Hedaya, I. 213.

† Hedaya, I. 244.

In the present case, "divorce by implication" is not pretended, nor, as the Mahomedan Sudr Ameen observes, could it be sustained if it were; as the husband declares himself not to have intended divorce by any expressions used by him: nor is "express divorce" by "injunction of edit" alleged. It therefore only remains to determine, 1st whether the expressions, stated by the appellant to have been used, viz. "Mind your own business;" "you shall not be governed by me in future;" be equivalent to what the law would, if uttered in Arabic, esteem an "express delegation of divorce," either in the way of "permission of choice," or "declaration of liberty;" and 2ndly, whether, if so, the "option" or "liberty" was so used by the appellant as to effectuate a legal divorce.

The Sudr Ameen seems doubtful whether either of the expressions does amount to such delegation, but the Civil Judge is of opinion, that the phrase "Mind your own business," ought in equity* to be so considered: it comes as near in meaning and terms to the prescribed "declaration of liberty" as can reasonably be expected where a different language is employed, "Amirke-ba-yed-ke" being literally "your business is in your own hands." But granting this, and that the appellant was therefore at liberty to divorce herself, she does not pretend that she availed herself of that liberty, and *did so* in legal manner, or indeed at all. The delegated authority to "choose divorce," or "take liberty," remains with the wife but for a moment. She must avail herself of it by answering "I choose," or, "I take or accept," &c.: if she even change her posture before answering her option is at an end.

Moreover, having duly availed herself of such option, and so become "divorced," she would be bound to demand from her husband permission to pass her "edit" in his house, and to *pass* it there. The plaintiff in this case does not pretend any such compliance with the law, and the Court therefore confirms the decree of the Sudr Ameen pronouncing no divorce to have taken place, and the parties to be still husband and wife in the eye of the law: as also so much of the decree as rejects the plaintiff's claim to dower in the present action. For dower is either "Moajil," prompt or exigible, or "Muivajil," deferred or not exigible. It is usually, as evidently in the present case, partly of the one kind and partly of the other: a portion, the exigible, being paid on the marriage; and the remainder being deferred, and not exigible till the termination of the marriage by death or divorce. The plaintiff (appellant) is clearly suing, as being divorced for that which she could not demand if not divorced; and which being pronounced not divorced, she therefore cannot have.

NOTE 1.—It does not appear to have been decided whether exigible dower is barred by limitation *during the life time* of the husband, and the reason is explained in a note at page 286 of Macnaghten's Principles and Precedents, q. v. In the present case it is not shown whether exigible dower were paid or not. If it were not paid, the reason for forbearance to demand it, ex reverentia maritali, would not apply, and therefore it is a question whether judgment for such part ought not to have been pronounced. Vide Macnaghten's Pre. p. 293.

NOTE 2.—Edit is defined in the Hedaya, vol. I. 359 to be "the term by the completion of which a new marriage is declared to be unlawful," and must be observed whether the divorce be reversible or irreversible. A husband is bound to provide his wife with subsistence and lodging during the time of her edit. Hedaya, vol. I. 406. Macnaghten's Precedents, p. 298.

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* Hedaya I. 252, 253, 254.

DIVORCE.

BY KHOOLA OR MUTUAL CONSENT.

One mode of Divorce is by means of Khoola, which is defined in the Hedaya, Vol. I. 314, to signify, " an agreement entered into for the purpose of dissolving a connubial connexion, in lieu of a compensation paid by the wife to her husband out of her property." The only case I have come across on the subject is epitomized below and is to be found at page 311 of the Decisions in 1856 of the Sudder Dewanny Adawlut, Bengal.

The Plaintiff founded her claim on the fact of divorce and sued her husband for payment of 26,000 Rs. due on a kabinnama or deed of marriage settlement.

The Defendant denied the divorce, and pleaded relinquishment of dower on the part of the Plaintiff, and the execution by her of a kholanamah, or deed consenting to the dissolution of the marriage.

The lower Court having decided in favor of Plaintiff, the Defendant appealed to the Sudder Dewanny Adawlut, and in the opening address his counsel urged, that Plaintiff was not entitled to recover, as no legal divorce had been proved, and the bare fact of pleading a khola, which had not been relied on by the Plaintiff, is not sufficient to constitute divorce.

But it was argued on the other side, that Tilaq is the divorce of the husband of his own will alone ; whereas khola is a divorce asked by the wife for a consideration, which the husband can agree to or refuse. If he consent, it has the force of a tilaq. If he refuse it becomes of no effect. It is stated in the Doori Mokhtear, page 307, " a husband sues on a khola for the consideration. The wife denies khola; the very declaration on his part of the khola, has the effect of a tilaq; because he can give tilaq arbitrarily." Another eminent authority, Fusool Imusadeeya (leaf 186, second page), has, in like manner declared, that by pleading a khola, he has admitted a tilaq with all its consequences. A passage from the Hedaya, Vol. I. page 314, was also cited to show that a single divorce is irreversible under khola for a valuable consideration.

In reply it was maintained on behalf of the appellant on technical grounds, that if the khola has the effect contended for plaintiff, there was no cause of action when the suit was instituted, it having been created only when the khola was pleaded.

Exposition of the Mahomedan Law by the Law Officer.

Hereupon the Court proposed the following question to their Mooftee :

" A wife sues for her dower, her husband, on the ground of a divorce.

" The husband denies the divoree, and pleads a Kholanamah in bar of her claim.

" The asserted divorce is not proved to have been given so as to become irrevocable under the Mahomedan law.

" The Kholanama too was held to be not proved. Does the mere fact of the husband pleading a Kholanama, have the effect of proving a divorce, such as to entitle the wife, to claim the immediate payment of the dower, just as if the alleged divorce had been proved ?"

Answer of the Moofty.

"Under the circumstances mentioned in the question put by the Court, the fact of the husband pleading or asserting a Khola (which means a divorce in lieu of property) will have the effect of a divorce, and will entitle the wife to claim the immediate payment of her dower, just as if the divorce had been proved.

"In page 481, of the Calcutta Edition of the Foosool Emadee, the following passage is to be found, "It is stated in the beginning of the book of claims of the 'Mobsoot' compiled by the lawyer Abool Syse, that when a husband claims (it matters* not whether the husband originally be a plaintiff or defendant) "that he has entered into a Khola with the wife, and the wife denies the Khola, the statement of the wife is to be credited, and a divorce takes place in consequence of the husband admitting a divorce, for an admission of Khola is an admission of divorce according to the precept in the Hedaya'* (above referred to) "that Khola is an irreversible divorce."

The next passage in the same page of the Foosool Emadee is, 'It is stated in the chapter of divorce of the 'Futawa-ad-Deenaree,' that when a husband *claims* or *pleads* a Khola in lieu of property, and the wife denies the Khola, divorce takes place in consequence of the husband admitting a Khola; and the claim of the husband, as to the compensation for Khola, will be left as it stands, that is, will entirely be dependent upon proof of such transfer.'"

"In the Doorool Mookhtear and Tuhtawee of the Egypt Edition, page 190, the following precept is mentioned: "If a husband claim a Khola in lieu of property, and the wife denies the Khola, divorce takes place in consequence of the husband's admission, that is, of Khola, which is an implied expression of divorce, because the fact of the husband pleading or alleging a Khola is an admission of divorce on his part, as shown above by the precepts of the works above mentioned, and as further proved by the author of the Tuhtawee, who has in his commentary of the Doorool Mooktear, in the same page (190) defined the terms which literally means "he admitted a divorce."

"Again in page 191 of the same Edition of the Doorool Mooktear, there is this passage, "when a wife claims her dower and maintenance for the term of probation (edit), upon the allegation of her being divorced by her husband, and the husband claims or pleads a khola (in bar of both the claims of the wife, i. e. dower and maintenance) and there be no proof of the allegations of either of the parties, the allegation of the wife (as to her being divorced by her husband) is to be credited as regards her claim for the dower, and she will be entitled to her dower; for it is stated in the Tuhtawee, in commenting upon the above passage of the Doorool Mookhtear, that as previous to the alleged khola the husband was liable to the dower, his claim of release from the dower, on the ground of an alleged khola, must be inadmissible."

Counsel on both sides having been heard for and against the correctness of the Futwa, the Court pronounced judgment as follows on the application of the law:

On perusal of the pleadings we find that the plaintiff instituted this suit for immediate payment of her dower, on the allegation that the defendant had turned her out of his house, and declared that he had divorced her. The defendant denied that he had divorced her, and pleaded a khola, or divorce *by her* in lieu of a consideration, and of her having relinquished her claim to dower under a previously executed ibranama. Here then is an admission of a divorce, but accompanied with a special plea of relinquishment of dower.

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* The words within the parenthesis are the Moofty's own construction.

" The futwa of our law officer declares, that the claim by a husband of khola is an admission of a divorce, and an irreversible divorce. In consequence of such pleading, the only material issue left for the Court to try, and decide, was the genuineness of the ibranama, and of the kholanama. These, the Principal Sudder Ameen has decided to have been not proved. The question now before this Court is, whether the mere pleading of a khola in defence, and inability to prove it, entitles the plaintiff to claim immediate payment of dower, notwithstanding she has failed to prove such a divorce by her husband as would have entitled her? We are of opinion, that as the defendant has rested his defence on the ibranama and kholanama, it has that effect. The plea to exempt from payment of dower in virtue of a kholanama, is an admission of such a divorce (that is an irreversible divorce) as entitles a wife to claim immediate payment of dower; and the release from such liability is dependent on proof of the truth of the kholanama and the ibranama, the burden of which lies on the defendant, for it is a special plea.

The arguments on these points are omitted as they contain nothing beyond comments on the evidence.

The appeal was eventually dismissed on the following grounds:

" We are of opinion, after a careful consideration of the evidence adduced, and the circumstantial facts on record in the case, that the evidence for the genuineness of the Ibranama* is utterly defective. Only one witness out of 7 or 8 has been produced to testify to it. It purports to have been executed by plaintiff, under the name of Wuzeerutoonnissa, a name she declares she never bore; and there is no proof that she was so called. It sets forth that it was given out of love and affection for her husband; yet bears the same date as his marriage with another lady, who had declared she would not enter his house until plaintiff was turned out of doors. In short, the terms of the deed with the reasons for giving it are altogether irreconcilable with the notorious conduct of the husband to the donor, and the known facts opposed to it. The recital of it in the kholanama by no means proves its due execution. The kholanama is certainly proved to have been witnessed according to the forms prevalent among Mahomedans of rank; but there is a remarkable want of care, evident on the part of the respectable witnesses, who have testified to it, to ascertain that the act of the lady was free and unrestrained. Finally the recorded fact that no fewer than six complaints of ill-treatment by her husband had been presented to the Magistrate by the plaintiff, from the date of the alleged Ibranama and the marriage with the second wife, to the date of plaintiff giving up her kabeenama and executing the kholanama, is sufficient, together with the other circumstances above alluded to, to satisfy the Court that the execution of the kholanama was not a voluntary unrestrained act. It is therefore a nullity. Decision of the Principal Sudder Ameen affirmed and the appeal dismissed with costs."

* Deed of discharge or acquittance.

DIVORCE.

ACCORDING TO ORDINARY CUSTOM.

The author of the Qanoon-i-Islam at page 145, has given an account of divorce as observed among the Mussulmauns of the Deccan. It must be observed that this work does not profess to treat of *legal subjects*, but it is held in high repute as an authority on Mahomedan *customs*.

He says, " there are three forms of tulaq or repudiation : 1st Tulaq-e-byn, which consists in the husband only once saying to his wife, " I have divorced you." 2nd, Tulaq-e-rujaee, in repeating the same twice. 3rd, Tulaq-e-mootuluqqa, in three similar repetitions.

" If a man divorce his wife by the Tulaq-e-byn, he may, within three menstrual periods take her back, but not afterwards.

" If he have given her the Tulaq-e-rujaee, he may, if both agree, either maintain her within doors, or giving her the dowry send her away.* In the former case, should the woman be unwilling to remain, she may, by resigning half or a quarter of the dowry, depart with the rest. Such a woman it is unlawful for him to take back, unless he marry her over again.

" With a woman divorced by the Tulaq-e-mootuluqqa, it is unlawful for the husband to cohabit, until she has married another man and been divorced by him.

" If a woman wish for a divorce, and the husband be disposed to grant it, he has resourse to the stratagem of expressing to her his disinclination; adding, that if she insists upon it, he will indulge her, but then she must consent to give up her claim to the marriage portion. The woman having no alternative, resigns her dowry,† and accedes to the divorce. Had he not adopted the above scheme, he would have been obliged to have given her the dowry before repudiating her.

" With a slave girl, it is unlawful for her master to cohabit after the Tulaq-e-rujaee (as in the case of a free woman after the third divorce), and she need only wait two menstrual periods, instead of three, before she marry again.‡

" In repudiating a wife, the husband is to wait till post mensem, and then, without touching, divorce her. Should she be§ with child he is to wait till she be delivered ; and then, taking possession of the child, dismiss her ; and, if he please, the mother is‖ obliged to suckle the infant two years.

* I am not aware of any authority for this custom.

† This is the khoola which formed the subject of the preceding decision.

‡ Hedaya I. 360. Some difference of opinion exists regarding the edit of an Oom-i-wulud or female slave who has borne a child to her master. Shafei declares it extends to one and Omar that it extends to three terms. Hedaya I. 364.

§ Vide Macnaghten's Precedents, p. 298.

‖ It would appear this obligation is optional and not incumbent on the mother. Hed. I. 386, 409.

"After once settling the dowry (that is after Neekah), but previous to consummating the hymeneal rites, if a man wish to divorce his wife, he is obliged to give her half the dowry; if he give the whole, it is so much the more commendable.

"It is directed in the sacred Qoran, that a woman may, four months and ten days after her husband's demise, marry again. But in Hindoostan, some women conceiving it more honorable not to marry after the death of one husband, never do so."†

NOTE.—Four months and ten days is the period of mourning appointed for a woman who has lost her husband. For the loss of other relatives she is only required to mourn three days. Hedaya, Vol. I. 370. The period of mourning is considered the Edit of widowhood, p. 360. Vide Digest Tit. Mar. 27 which shows that marriage contracted within this period is null and void.

* Vide Macnaghten, p. 272, and Digest Tit. Dower 33.

† Macnaghten's Preliminary Remarks to the Principles and Precedents, page XXVI.

QUESTIONS FOR STUDENTS

ON THE

PRINCIPLES AND PRECEDENTS

OF

MACNAGHTEN'S MAHOMEDAN LAW.

QUESTIONS ON THE SOONNIY LAW OF INHERITANCE.

PAGES 1—41, 83—165.

1. What distinction is there between real and personal, and ancestral and acquired property ?
2. Does the doctrine of primogeniture exist under the Mahomedan law ?
3. What is the difference between the share of a son and a daughter ?
4. To what extent are legacies in favor of heirs valid ?
5. In what order should an inheritance be distributed ?
6. State the causes which exclude from inheritance ?
7. Are there any exceptions to the causes of exclusion ?
8. Does inheritance ascend and descend at the same time ?
9. Does the right of representation exist under the Mahomedan law ?
10. What is the specific share allotted to a son and his son ?
11. Who are the heirs who are not liable to exclusion ?
12. Are brothers and sisters of the half blood on the same footing as brothers and sisters of the full blood ?
13. Does any peculiarity attend the allotments of legal sharers and residuaries ?
14. What are the shares of a widow and widower ?
15. To what portion does an only daughter succeed ?
16. Where there are two or more daughters how much do they take ?
17. To what proportion of an estate are son's daughters entitled ?
18. How are their rights to succeed affected ?
19. Under what circumstances are brothers and sisters excluded ?
20. Is there any difference between the Soonniy and Schia doctrines relative to the exclusion of brethren ?
21. What are the shares of uterine brothers and sisters ?
22. How are the shares of sisters affected ?
23. Describe the doctrine relative to the succession of half brothers and half sisters, and the circumstances which affect their succession ?
24. To what shares are the father and mother entitled ?
25. Under what circumstances may a grand-father and grand-mother succeed ?
26. What are the circumstances which exclude the succession of paternal female ancestors, and which of them is excepted from the exclusion ?
27. To what share are maternal grand-mothers entitled, and what rule of exclusion prevails with respect to them ?
28. Describe the relations who are legal sharers and those who are residuaries ?
29. What relatives are termed the first class of distant kindred ?
30. Who are termed the second class of distant kindred ?

31. Who are understood to constitute the third and fourth classes of distant kindred?

32. Who succeed in default of relatives of the distant kindred of the 1st, 2nd, 3rd and 4th classes?

33. What is the rule in regard to the exclusion of the distant kindred when the estate to be inherited belonged to an enfranchised slave?

34. State the rules with respect to the succession of the four classes of distant kindred?

35. What rules govern the succession of children of the distant kindred?

36. Who is an acknowledged kinsman and under what circumstances may he succeed?

37. When does property escheat?

38. Into how many shares should property be divided when there are

2 Claimants one entitled to $\frac{1}{2}$ and the other to a $\frac{1}{4}$th.

2 „ one „ $\frac{1}{2}$ „ the „ $\frac{1}{8}$th.

39. Can a case occur where property should be divided into $\frac{1}{2}$, $\frac{1}{4}$th and $\frac{1}{8}$th.

40. Into how many shares should property be divided where there are

2 Claimants one entitled to $\frac{1}{6}$th and the other to $\frac{1}{3}$rd.

2 „ one „ to $\frac{1}{6}$th „ $\frac{2}{3}$rds.

2 „ one „ to $\frac{1}{3}$rd „ $\frac{2}{3}$rds.

41. Can a case occur where property should be divided into $\frac{1}{6}$th, $\frac{1}{3}$rd and $\frac{2}{3}$rds?

42. Into how many shares should property be divided where there are

3 Claimants one entitled to $\frac{1}{2}$ one to $\frac{1}{6}$th, and one to $\frac{1}{3}$rd or $\frac{2}{3}$rds.

3 „ one „ $\frac{1}{4}$ one to $\frac{1}{6}$th, and one to $\frac{1}{3}$rd or $\frac{2}{3}$rds.

3 „ one „ $\frac{1}{8}$ one to $\frac{1}{6}$th, and one to $\frac{1}{3}$rd or $\frac{2}{3}$rds.

43. When six is the number of shares to what number may it be increased?

44. To what numbers may 12 and 24 be increased?

45. Explain the terms

Mootumasil, or equal.
Mootudakil, or concordant.
Mootuwafiq, or composit.
Mootubayun, or prime.

46. Describe the seven principles of distribution?

47. Define exclusion, partial and entire?

48. Does a person who is entirely excluded by reason of personal disqualification exclude others?

49. Do persons who are excluded by reason of some intervening heir exclude other heirs?

50. What is the rule where one of the heirs makes a surrender of his right?

51. Define the term increase?

52. In what cases does an increase occur?

53. What do you mean by the return?

54. State the several circumstances under which a return takes place?

55. Define the term Vested Inheritance?

56. Describe the rules which govern this branch of the law of distribution?

57. What becomes of the property of a missing person?

58. How does distribution take place when a missing person is a coheir with others?

59. What is the rule when a person dies leaving his wife pregnant?

60. What is the rule of succession where two or more individuals of the same family meet with a sudden death at the same time?

61. State the rules which govern the apportioning of assets between heirs and creditors?

62. Who may claim partition of an estate by inheritance?

63. When is the consent, of all the coheirs, to partition, requisite?
64. In what mode should distribution be made?
65. What is meant by partition by usufruct?
66. Is a father at liberty to disinherit any one of his sons during his life time?
67. On whom does the property of a woman devolve, if inherited from her husband and son?
68. Are the offspring of slave girls entitled to inherit the property of their father?
69. Does apostacy after the death of an ancestor bar inheritance?
70. Does adoption confer any right under the Mahomedan law?
71. Does suspicion of murder exclude from inheritance?
72. To what extent are heirs answerable for the debts of their ancestors?
73. Does insanity or blindness disqualify from inheritance?
74. What effect has renunciation of inheritance in the life time of an ancestor?
75. Are illegitimate children entitled to a share in the inheritance?
76. When there are two widows, how do they share?
77. What are the impediments to a wife's succession?
78. What is the legal consequence of separation from a wife without divorce?
79. When does repudiation by a father operate as a bar to inheritance?
80. What is the legal effect under the Mahomedan law of the acknowledgment of children by their parents?
81. To whom does property purchased by a married woman in her own name, belong?

QUESTIONS ON THE SCHIA LAW OF INHERITANCE.

1. What are the sources of inheritance?
2. Describe the three degrees of heirs, their sub divisions and the leading rules applicable to each class?
3. Explain the rules relative to the half and whole blood?
4. What relatives are excluded under this system?
5. To what share is the husband or wife entitled?
6. In the event of death before consummation, how are the rights of the husband or wife affected?
7. What effect has a death bed divorce under the Schia doctrine?
8. Does a wife inherit in case of reversible divorce or of irregular marriage?
9. Explain the doctrine of Willa?
10. Does difference of allegiance or homicide bar inheritance?
11. What are the rules applicable to the increase and return among the Schias?
12. To what extent is primogeniture recognized among this sect?

QUESTIONS ON THE LAW OF SALE.

PAGES 42—46, 166—180.

1. Define the term sale?
2. How may a contract of sale be effected?
3. How many descriptions of sale are there?
4. Of what may the consideration of a contract of sale consist?

5. Who may be parties to a contract of sale?
6. What are the essentials to the validity of every such contract?
7. State a few instances of illegal stipulations?
8. May a stipulation for dissolving a contract be made at the time of contracting?
9. In what way may payment be deferred?
10. Is it lawful to sell property in exchange for a debt due by a third party?
11. When may property be resold by the purchaser?
12. What passes on a sale of land?
13. State the rules regarding the dissolution of contracts of sale, and the option of annulling such contracts?
14. What rules govern defects?
15. Is a sale on Friday valid?
16. Are forestalling, regrating and engrossing permitted under the Mahomedan Law?
17. Describe the difference between the legal provisions of sale and gift?
18. Is a sale of undivided property by one parcener valid?
19. Are seizin and division essential to the validity of a contract of sale?
20. Give an instance of circumstances which render a sale complete and binding?
21. In what method may a father sell property to his minor son?
22. Describe a condition calculated to render a contract of sale invalid?
23. Can a mother as guardian to her minor son sell any portion of his immoveable property under any circumstances. In what case will such a sale be valid?
24. Can an acknowledgment of sale be subsequently retracted?
25. Does informality vitiate a deed of sale?
26 How does the right of pre-emption affect a sale; and how are the seller and the purchaser affected thereby?
27. How is a contract of sale affected by uncertainty?
28. What is the meaning of the term Beea Mokasa?
29. Is immediate delivery essential to a contract of that description?
30. What contingencies are likely to arise, on an absolute sale to one person, during the existence of a conditional sale to another?
31. Is a sale made on a death bed to an heir valid?
32. Can a man, to the prejudice of his other creditors, sell all his property to his wife in satisfaction of her dower?
33. Should a man sell another person's property together with his own, how will the contract stand affected?
34. What is the rule which governs sales by persons on their death beds, and persons not in full possession of their mental faculties; and how are heirs and creditors affected thereby?
35. What is implied in a contract of sale?

QUESTIONS ON PRE-EMPTION.

PAGES 47—49, 181—196.

1. Define pre-emption or Shoofaa?
2. To what cases does the right of pre-emption apply, and what cases of transfer are exempt from its operation?
3. To what property does it apply?
4. Does it apply before the sale is complete?
5. Who may claim the right of pre-emption?

6. Does difference of religion bar the exercise of the right ?
7. What right does a purchaser under the right of pre-emption acquire ?
8. In what manner must a person asserting this right proceed ?
9. What rights are reserved to the purchaser and seller against an assertor of the right of pre-emption ?
10. If property has been improved or deteriorated by the purchaser. how does an assertor of this right stand affected ?
11. If the property should prove not to belong to the seller, after it comes into possession of a purchaser by right of pre-emption, can he claim credit for improvements ? In such case what is his remedy ?
12. Where a dispute exists regarding the price paid, how should it be decided ?
13. How may a claim under the right of pre-emption be legally evaded ?
14. Within what time after knowledge of a sale should such right be asserted ?
15. Is an immediate claim before witnesses essential to keep the right alive ?
16. Must a claim if not allowed be followed by immediate litigation, if not what is the consequence ?
17. If information of a sale be obtained at two different periods, is the assertion of the claim after the receipt of the last information sufficient to maintain the right ?
18. Should payment within reasonable time after adjudication not be made by an assertor of the right of pre-emption, is the right defeated ?
19. Does sale to a relative, bar the claim of a stranger possessing the right ?
20. What rights have two persons possessed of equal claims to the right of pre-emption ?
21. Does the fact of the property being under litigation defeat the right ?
22. Do zemindars possess the right of per-emption of rent free lands situated within their estates ?
23. If a person refuse to pay the price stipulated to be paid by a purchaser, does his right of pre-emption hold good ?

QUESTIONS ON GIFT.

PAGES 50—52, 197—240.

1. Define gift ?
2. What are the essential conditions of a gift ?
3. Can it be made to depend on a contingency ?
4. Can it be deferred to take effect at a future period ?
5. When should seizin be made in case of gift ?
6. Can gift be made of a thing not in existence at the time of donation ?
7. Is a gift of undefined property valid ?
8. What is the rule when a gift is made to two or more donees ?
9. Can a gift be implied ?
10. Is relinquishment on the part of the donor essential ?
11. Do the ordinary rules prevail when a husband bestows a gift on his wife or minor child ?
12. What is the rule in case of a gift to a trustee, or to a minor under care of a guardian ?

13. What operation has a death bed gift to a stranger and an heir ?
14. Can a donor resume a gift, if so, what are the exceptions ?
15. Define Hibba-bil-Iwuz and Hibba-ba-Shurt-ool-Iwuz ?
16. What constitutes the difference between such gifts and a sale ?
17. Is a gift valid when the donor continues to exercise acts of ownership over it ?
18. What is the difference between a gift made in health and one made in sickness ?
19. Can a man make a gift of his property to one heir to the prejudice of other heirs ?
20. What evidence is necessary under the Mahomedan law to prove a gift ?
21. Is a verbal gift valid ?
22. Must delivery and division between two or more donees be made simultaneously, or is it sufficient if the donees subsequently divide the property between themselves ?
23. If property which admits of being given away, and property which does not admit of being given away, be bestowed in gift at the same time, is such gift valid ?
24. Is a gift of unrealized produce, without the land, valid ?
25. Will seizin of undefined property impart validity to a gift ?
26. If a gift be made of property which does not wholly belong to the donor, and the circumstance be only discovered afterwards, does the fact of the donor not being sole proprietor invalidate the gift ?
27. How would such a case stand, had the claim of the third party been known to exist at the time of the gift ?
28. May a donee sue for property bestowed on him in gift, for the purpose of taking possession ?
29. If the donor were dead before adjudication or suit brought, in such case would the gift be held good ?
30. Is previous emancipation necessary to impart validity to a gift to a slave ?
31. When lands are well known, is specification of boundaries essential in a deed of gift ?
32. In what case should such specification be made ?
33. Does error in a deed invalidate the gift ?
34. Is specification necessary where the gift comprises the whole property of the donor, and is made in favor of only one donee ?
35. Are the knowledge, presence, and consent of a donor's heirs essential to a gift ?
36. What is the difference between an undefined gift of divisible property made to paupers or persons in indigent circumstances, and a similar gift made to a rich person, and upon what principle is the difference founded ?
37. Does the death of a donor or donee operate to preclude the resumption of a gift ?
38. Does the objection of indefiniteness apply to a gift, made by a person to his sole partner ?
39. Is the seizin of others than guardians sufficient to impart validity to a gift, made to a minor, by a stranger ?
40. Suppose there are three partners in an estate, and one of them make over his proprietary right to another partner, does any objection exist to the gift ?
41. Are gifts affected by being accompanied by invalid conditions ?
42. Is seizin, after the death of the donor, sufficient to impart validity to a gift ?
43. Is seizin requisite in case of a gift of Hibba bil-Iwuz, or mutual gift ?
44. Can a gift of such a nature be subsquently disposed of by the donor ?
45. Does debt preclude the making of such a gift ?
46. Is seizin requisite in case of a gift of Hibba-ba-Shurt-ool-Iwuz or gift on stipulation ?
47. Is such a gift once made at the disposal of the donor ?
48. What principles govern Hibba-bil-Iwuz and Hibba-ba-Shurt-ool-Iwuz ?
49. What is the rule respecting inhibitions in case of imbecility, profligacy, and debt ?

50. Does the circumstance of money forming part of the gift in return, alter the character of a Hibba-bil-Iwuz, if so, in what manner?

51. If a donor retain a small portion of the property bestowed in gift, intending to make it over on death, is such a gift valid?

52. Would the sale by the donee of the whole property referred to in the preceding question, with the donor's consent, be held valid and if so, upon what principle?

53. What are the obstacles to the resumption of a gift!

54. Who can make seizin on behalf of an infant?

55. Is a gift detrimental to heirs valid if attended with the necessary legal requisites?

56. If a man bestows his property on another in gift can he legally give a portion of the said property to a third party, with the consent of the original donee? What principle governs such a case?

57. Under what circumstances is seizin by a stranger on behalf of a minor donee sufficient?

58. Must resumption of a gift be express or implied?

59. If a man occupy in any way a house, bestowed by himself on another person, is such gift valid? What are the exceptions to the rule which governs such a case?

60. Do a wife and husband, jointly own a gift, made to one of them separately?

61. Is the recipient of an invalid gift accountable for profits accruing therefrom?

QUESTIONS ON WILLS.

PAGES 53—55, 241—249.

1. Is there any difference between nuncupative and written wills?

2. Is there any difference between wills respecting real and personal property?

3. To what extent may legacies be bequeathed?

4. How may a legacy be left to an heir?

5. What is the difference between property which is the subject of inheritance, and property bequeathed?

6. Which must be satisfied first, legacies, debts, or claims of inheritance?

7. How is an acknowledgment of a debt on a deathbed viewed, and to what extent does it avail?

8. What may become the subject of a legacy?

9. What is the effect of illegal provisions in a will?

10. If a man becomes entitled to a share in an inheritance, after the execution of a will in his favor, what claim has he to the legacy bequeathed?

11. Should he be an heir at the execution of the will, and be subsequently excluded from the inheritance, how is his right affected?

12. Can a bequest be annulled, if so, in what manner?

13. In what cases does an abatement in legacies occur?

14. What is the rule where two legacies, of different value, are left, at different times, to the same individual?

15. What becomes of a legacy left to two individuals indiscriminately, should one of them die before the legacy falls due?

16. Who may be executors?
17. Can an executor resign his trust?
18. Where there are two executors can one act singly?
19. What effect has a will, if the property bequeathed, be not in possession of the testator at the time of his death?
20. State the distinction between a gift and a legacy?
21. Should a person declare another to be sole heir to his property, what is the construction which may be placed on such a declaration?
22. Where there are no heirs or creditors, may the whole property be bequeathed by will?
23. May a legacy be conferred or retracted by implication?
24. What remedy has a person who may have acquiesced in a will, should he subsequently resolve to retract?
25. May the consent of an heir to the provisions of a will be implied?
26. Does indefiniteness invalidate a legacy?
27. What effect should be given to a will containing legacies which the testator was competent to bequeath, and which he was not competent to bequeath?
28. Can a testator bequeath more than one-third of his estate?
29. What construction should be placed on a will containing words of general import?

QUESTIONS ON MARRIAGE, DOWER, DIVORCE, AND PARENTAGE.

PAGES 56–61, 250—303.

1. Define the term marriage?
2. What are the essentials to a contract of marriage?
3. Who are at liberty to form such a contract?
4. Can the contract be entered into by an infant or a lunatic?
5. What are the conditions essential to such a contract?
6. Who may be witnesses thereto?
7. What objections apply to witnesses to such a contract?
8. In what manner may a proposal be made?
9. What is the effect of a contract of marriage?
10. How many wives is a man at liberty to have at the same time?
11. What persons is a man prohibited from marrying?
12. Is a freeman at liberty to marry a slave?
13. Does difference of religion constitute an impediment to marriage with a Mahomedan?
14. What affords a presumption of marriage?
15. Is the presence of witnesses necessary at the nuptials?

16. Is a woman, who has attained the age of puberty, under any restriction with respect to marriage?
17. What power can a guardian exercise, in the case of marriage of a woman, who has attained the age of puberty, and in case of one who has not?
18. Within what time is a guardian at liberty to interfere?
19. May an infant who has been married by its guardian, dissolve the contract after attaining maturity?
20. Within what time may an objection be raised by an infant?
21. Who may dispose of an infant in marriage?
22. What is a necessary concomitant of a contract of marriage?
23. When does dower fall due?
24. What is the rule with respect to dower when no amount is fixed?
25. What is the rule when the term of payment has not been expressed?
26. Does fosterage present any obstruction to marriage?
27. State the rules relative to divorce?
28. Is a husband, who has irreversibly divorced his wife, at liberty again to cohabit with her?
29. What is the rule in case of a deathbed divorce?
30. May divorces take place in any other than the ordinary way?
31. Is a wife at liberty to purchase a divorce from her husband?
32. Is impotency ground for separation?
33. Within what time after marriage, death, or divorce, is the birth of a child recognized as legitimate?
34. What is the rule relative to the paternity of the children of a female slave?
35. Is a man at liberty to acknowledge a person as his son?
36. Can a promise of marriage be legally enforced?
37. Is dower, or presents, given in anticipation of marriage, recoverable, should the marriage not take place?
38. If a present so given, be lost or destroyed, can its value be recovered?
39. Does the mere bestowal and acceptance of presents, in anticipation of marriage, render the contract complete and binding?
40. Is a written engagement to marry tantamount to an actual contract of marriage?
41. What is the rule prohibiting the marriage of children who have imbibed the same milk?
42. Is marriage with a pregnant woman permitted?
43. Can maintenance be claimed in arrears?
44. Does the property of a wife vest in her husband on marriage?
45. Can a married woman dispose of her own property without the consent of her husband?
46. May a man make a gift of all his property to his second wife, although he has children by his first wife living?
47. If a man at the time of marriage, enters into an illegal agreement with his wife, is he at liberty to evade its performance?
48. Can a wife be compelled to reside with her husband if her dower be not paid?
49. Have the parents of a man betrothed to a girl, the right of disposing of her in marriage, should the intended husband die before the nuptials?
50. Is a man at liberty to marry his wife's sister during his wife's life time?
51. May he marry his wife's sister after his wife's death, or after having divorced her?
52. May he marry two sisters at the same time?
53. What ceremonies are requisite to be observed at a marriage?
54. Is hearsay evidence admissible with respect to marriage and parentage?
55. Can a Mussulmaun lawfully enter into a state of matrimony with his slave girl?

56. What description of slave girls is a Mussulmaun at liberty to marry?
57. Is a Mussulmaun at liberty to marry five wives at the same time?
58. Is dower payable in the case of an invalid marriage?
59. In whom is the offspring of an invalid marriage established?
60. Is a man at liberty to marry a free woman after his marriage with a slave?
61. If a woman be married to two husbands in succession, which of them has the right to her?
62. Is a marriage during the period of edit, or term of probation, valid?
63. Is the approbation of guardians necessary after marriage?
64. Is the bare acknowledgment of a husband sufficient to establish a marriage, in default of better evidence?
65. Is a woman entitled to dower where no specific sum is proved to have been stipulated?
66. Are heirs at liberty to inherit an estate previous to the liquidation of dower?
67. In the absence of a legal guardian, have the maternal or the paternal kindred, the right of disposing of an infant in marriage?
68. May an infant married by her guardian dissolve the contract after attaining the age of majority?
69. May residence with her husband be prohibited to a minor wife, until payment of dower?
70. May an infant wife who has voluntarily contracted marriage, dissolve the tie after attaining majority, if so, at what period must she assert the privilege?
71. In what cases may an infant wife annul the marriage contract on attaining her majority?
72. When is a female considered an adult under the Mahomedan law?
73. What evidence is sufficient to prove majority in a female?
74. Up to what period have the mother and grandmother power over the daughter?
75. In what case may a mother bestow her daughter in marriage?
76. Define the term consort, and state how many descriptions of consorts are known to the Mahomedan law?
77. Is parentage of the children of a female slave established in her husband, or in her master?
78. If a minor, not married with the consent of his guardian, promise dower to his wife, is the dower recoverable?
79. May dower be recovered from a man who annuls a marriage on attaining his majority?
80. Is a divorce pronounced by a minor or a lunatic valid?
81. To what extent is a deathbed acknowledgment of dower valid?
82, What is the distinction between proper and express dower?
83. When dower has been expressly fixed, is a woman at liberty to claim proper dower?
84. What is the difference between dower Moujjil and dower Mowujjal?
85. Does the law make any distinction between a claim of dower and other debts?
86. What evidence is required to prove a claim of dower?
87. May a widow, holding possession of the estate of her deceased husband, in security for dower due to her, be compelled to surrender the same previous to satisfaction?
88. What lien has a wife on the estate of her husband for dower?
89. Is seizin by a wife necessary when a husband assigns to her all his property movable and immovable, in satisfaction of her dower?
90. Is a wife at liberty during her life time to remit to her husband the debt due to her on account of dower?
91. Does a remission of dower bar a wife's claim to share in the inheritance of her husband's estate?
92. Is a wife at liberty to claim dower from her husband during his life time?

93. After the death of a wife, what becomes of dower not recovered during her life time?
94. May a claim of dower be extinguished by a mutual testament of husband and wife in favor of each other?
95. What is the rule, when the payment of dower is stipulated to be made in part, promptly, and in part, deferred, should the portion to be paid promptly not be defined?
96. Does a wife from whom dower has been unjustly withheld, owe allegiance to her husband?.
97. Should a wife withhold her allegiance on account of non-payment of dower due, is she notwithstanding entitled to maintenance?
98. Before dower deferred, or stipulated to be paid at a future period, falls due, is a wife at liberty to resist the authority of her husband, in consequence of its non-payment?
99. Is there any period of limitation to bar a claim of dower?
100 If a man give presents to his wife, can their value be deducted from her dower?
101. When a dispute occurs between a husband and a wife regarding the intention with which presents were given, by what evidence should it be determined?
102. Is a deed necessary to support a claim of dower?
103. Is the law of limitation applicable to a case, wherein, a woman's heirs claim to share in her dower after her death?
104. What is the earliest age of female puberty known under the Mahomedan law?
105. Does the age of the wife affect her right to dower?
106. What is the object of stipulating for the payment of unreasonably excessive dower?
107. Is dower claimable on divorce?
108. Is stipulated dower, however excessive, claimable at law?
109. Is a man at liberty to assign all his property to his wife, in *full* satisfaction of her dower?
110 Is the assignment by a man of all his property, in satisfaction of an *unspecified* portion of his wife's dower, valid?
111. What principle governs the cases referred to in the two preceding questions?
112. Is assignment as dower, of property not in possession of the husband, valid?
113. What circumstances would render such an assignment valid?
114. Is certainty requisite in contracts of exchange connected with dower?
115. What dower should be awarded when no evidence exists to prové the amount originally fixed?
116. Describe the Mahomedan Law of Evidence with respect to cases of disputed dower, between husband and wife?
117. If a man barely say to his wife "you are not my wife," is such an expression tantamount to a divorce?
118. Can a declaration of divorce have restrospective effect?
119. From what period does a declaration of divorce take effect?
120. What is the edit, or term of probation, of a woman divorced from her husband?
121. Is a divorced wife entitled to maintenance from her husband during the term of eidt?
122. To which of the parents does a bastard child belong,—and to which of them should the charge be confided?
123. Is a man at liberty to bastardize his children?
124. In what way may a child be legitimatized by its father?
125. Under what circumstances will the parentage of children be established without acknowledgment?
126. Upon what authority is hearsay evidence admitted in cases of marriage?
127. At what period is denial of parentage available?

QUESTIONS ON THE LAW OF GUARDIANS AND MINORITY.

PAGES 62—64, 304—310.

1. At what age does the term of minority cease ?
2. Who may be guardians ?
3. What are the powers of guardians ?
4. Under what circumstances may maternal relations assume the right of guardianship, and to what purposes does their authority extend ?
5. What is the duration of a mother's control, over sons and daughters ?
6. When does a mother forfeit her right ?
7. Should a mother forfeit her right to the control of her children, can she subsequently regain it ?
8. In what order do paternal relations succeed to the right of guardianship, and for what purposes ?
9. Is a minor, on coming of age, responsible for debts contracted by his guardian on his behalf ?
10. What are the civil disqualifications of a minor ?
11. To what extent may a minor act ?
12. Under what circumstances may a guardian sell his wards immovable property ?
13. What contracts entered into by a guardian, or ward during minority, are valid ?
14. What are the civil and criminal responsibilities of minors ?
15. How many descriptions of guardians are there ?
16. To whom does guardianship for the purpose of matrimony attach ?
17. On whom does the guardianship of property legally devolve ?
18. Have the mother, the paternal uncle, and the maternal uncle, a legal title to the guardianship of the property of minors ?
19. Can a mother convey a right of guardianship to another ?
20. Under what circumstances may a guardian sell his ward's personal property ?
21. Who are near—and who are remote guardians ?
22. May near and remote guardians enter into a contract on behalf of a minor, if there is a possibility of loss accruing ?
23. May a guardian enter into a contract where the loss is certain ?
24. May a guardian make a donation, or grant a loan, on account of a minor ?
25. Is a mother eligible to be nominated guardian ?
26. Is a lease granted to a guardian on behalf of a minor valid ?
27. Is seizin by a guardian sufficient in case of lease ?
28. Under what circumstances is a minor, on coming of age, permitted to object to a lease taken on his behalf by his guardian, during minority ?
29. May an action be instituted by a minor with the approbation of his guardians ?
30. May executors act separately, or must they always act conjointly ?
31. Where there are two executors, may one sue singly ?

QUESTIONS ON THE LAW OF SLAVERY.

PAGES 65—68, 311—326.

1. How many descriptions of slaves are there ?
2. Are slaves the subjects of inheritance and contracts ?
3. Into how many classes is bondage divided,—describe each ?
4. Is a female slave who has borne children to her master entitled to unconditional emancipation on his death ?
5. In whom is the parentage of such children established ?
6. What are the disqualifications of slaves ?
7. What privileges do they enjoy ?
8. May slaves be licensed ?
9. What are the rules relative to the marriage of slaves ?
10. May a man who has a free wife marry a female slave ?
11. Can he marry his own slave girl ?
12. Can a slave marry his mistress ?
13. Can a man become a slave to a relative ?
14. In whom does the property in the issue of slaves vest ?
15. Is a person at liberty to sell himself into slavery ?
16. Is a person at liberty to hire himself out for an indefinite period ?
17. May a minor annul such a contract on attaining majority ?
18. What are the provisions of the Act which abolished slavery throughout British India ?
19. Does emancipation necessarily follow adoption of a slave by a master ?
20. What descriptions of slaves are authorized by the Mahomedan law ?
21. Should a slave by conquest become a convert to Islamism, what privilege does he acquire ?
22. Is he entitled to emancipation ?
23. Does the same rule apply to both sexes ?
24. Are free parents at liberty to sell their children into slavery ?
25. Can a person legally free become a subject of property ?
26. Are the sale and purchase of Ethiopians and Nubians, not captured in war, valid,—and if so do they become legal slaves ?
27. Are parents at liberty to enter into contracts of hire on behalf of their children ?
28. What principles govern, in general, the Mahomedan law of contracts of hire ?
29. Are the sale and purchase of female children, for the purpose of being educated as dancing girls, permitted under the Mahomedan law ?
30. What is the power of owners over their slaves, male and female,—and what duties can he require them to perform ?
31. Is maltreatment of a slave by a master punishable ?
32. Is maltreatment sufficient to justify emancipation ?
33. Is the ruling power at liberty to grant emancipation to a person who is not strictly a legal slave ?
34. What circumstances are essential and necessary to emancipation ?
35. Can a slave inherit property ?
36. Is a female slave who has borne children to her master entitled to inherit ?

37. Is the offspring of a legal female slave, without marriage with her master entitled to inherit his property ?
38. Is the offspring of a woman, who is not legally a slave, entitled to inherit, without marriage ?
39. When the owners of a male and female married slaves are different individuals, to whom does the issue belong ?
40. May consent on the part of the master, to the marriage of a female slave, be inferred ?
41. Is the marriage of a free woman with a slave valid ?
42. Is a slave responsible for the dower of his free wife ?
43. Have the parents of an illegitimate child the power to sell it into slavery ?

QUESTIONS ON THE LAW OF ENDOWMENT.

PAGES 69—71, 327—344.

1. Define the term endowment ?
2. May an endowment become a subject of Sale, Gift, or Inheritance ?
3. If an appropriation be made *in extremis*, to what extent does it take effect ?
4. May undefined property become the subject of endowment ?
5. Under what circumstances is sale of endowed property allowable ?
6. What rule governs the grant of an endowment with reversion to the poor ?
7. Under what circumstances may the superintendent of an endowment be removed ?
8. Has the appropriator the power of removing the superintendent ?
9. What is the rule regarding the succession to superintendencies ?
10. Under what circumstances may specific property endowed, be exchanged for other property ?
11. For what term of years may endowed lands be farmed out ?
12. In what cases may the will of the founder be over ruled ?
13. Where there are two superintendents, may one act independently of the other ?
14. Where the appropriator reserves to himself the moiety of the superintendence, is he at liberty to act singly and of his own authority ?
15. What is the rule with respect to the appointment of superintendents of public and private endowments.
16. May property endowed be assigned as dower ?
17. Should property be so assigned by a trustee, is he liable to removal from his trust ?
18. In the absence of the appropriator or his executor in whom does the appointment to the trust of an endowment vest.
19. May endowed property misappropriated be reclaimed ?
20. When proceeds of the sale of endowed property are misappropriated may a sale be set aside ?
21. How many descriptions of royal grants of endowment are there ?

22. Is the Law of Inheritance applicable to an Altumgha or grant made for personal purposes?
23. Is a wuqf or grant made for charitable or religious purposes the subject of inheritance?
24. What portion of an endowment is subject to partition?
25. Is the ruling power at liberty to order a partition of the profits of lands appropriated for the support of a religious and charitable institution and for the maintenance of the superior?
26. Is a gift of profits of endowed land by a sharer in them valid?
27. May the benefit to a person arising from a charitable donation be defeated?
28. Are descendants from the female line entitled to succeed as superiors of an endowment, restricted to the offspring of the original ancestor?
29. May a female become the superior of an endowment?
30. Is a female eligible to the office of superintendent of an endowment?
31. Who has the patronage of an endowment of a Mosque, built, with or without consent of the owner of the land on which it was erected?
32. In whom is the patronage of an endowment in general vested?
33. Are cemeteries and religious buildings heritable, if not wuqf?
34. Does all property destined to religious purposes necessarily partake of the nature of an endowment?
35. How are the revenues of lands attached, and offerings made, to the shrine of a departed saint, to be divided?
36. How and by whom should a superintendent be appointed to such a shrine?
37. Define the term wuqf?
38. Upon what tenure does the trustee of an endowment hold his office?
39. What is the distinction between the offices of Mootawulee or trustee, and Guddee Nisheen or superior of an endowment?
40. What right does a superior confer on a disciple by appointing him successor to his office?
41. Does such appointment confer on the disciple the right of inheritance to the property endowed?
42. Is succession to the office of trustee, or superintendent of an endowment, necessarily hereditary?

QUESTIONS ON THE LAW OF DEBTS AND SECURITIES.

PAGES 72—75, 345—357.

1. Are heirs responsible for the debts of their ancestors?
2. When should debts acknowledged on a death bed be paid?
3. What is the rule relative to a debt acknowledged in favor of an heir on a death bed?

4. If two persons jointly contract a debt, and one of them die, is the survivor responsible for payment of the whole debt ?
5. What is the rule when one of two joint sureties dies without paying ?
6. In what cases are partners in trade jointly and severally responsible ?
7. For what debts contracted by a guardian, is a ward responsible after coming of age ?
8. May an inhibition be laid on a debtor to exclude him from the management of his own affairs ?
9 In what cases is a debtor liable to imprisonment ?
10. For what period may a debtor be imprisoned ?
11. In what order should the property of a debtor be rendered available for his debts ?
12. What is the distinction between mortgages and pledges ?
13. Is hypothecation known to the Mahomedan law ?
14. What is essential to a mortgage ?
15. What power has creditors over pledges or mortgages ?
16. Upon whom lies the obligation of providing for the care of a pledge ?
17. Is a mortgagee at liberty to use a pledge ?
18. What is the rule when a pledge or mortgage is destroyed in the hands of the mortgagee ?
19. On the death of the mortgagor, may the mortgagee apply the pledge or mortgage in his hands, to the satisfaction of his own debt, in preference to the claims of other creditors ?
20. In what manner should an insolvent estate be distributed among creditors ?
21. What is the rule regarding priority of claims ?
22. What is the difference between simple debts, and debts due on promissory notes or bonds ?
23. Can a debtor on a death bed, devise, or otherwise alienate his property to the prejudice of his creditor ?
24. Does dower take priority of other debts ?
25. Can property made over by a husband to his wife, in satisfaction of her dower, be held answerable for the husband's debts after his death ?
26. What remedy has a surety who pays the whole debt of a principal against his co-surety, and how much can he recover ?
27. What view should be taken of payment made by one of two sureties ?
28. On what principle are profits of an estate mortgaged to be accounted for ?
29. Is the receipt of interest permitted under the Mahomedan law ?
30. To what extent has the Mahomedan law on the subject of usury been modified by the British Regulations ?
31. Under what circumstances may mortgaged property be disposed of previous to redemption ?
32. If a mortgagor dispossess the mortgagee, does the mortgage still continue in force ?
33. What is the difference between pawn and mortgage ?
34. Is a contract to pay the debts of a lessor in consideration of a lease valid ?
35. Does a lease expire with the grantor ?
36. Is a deed necessary to prove a claim to dower ?
37. Is a lease without a term valid ?
38. Does the death of a lessee terminate a lease ?

QUESTIONS ON CLAIMS AND JUDICIAL MATTERS.

PAGES 37—81, 358—379.

1. Is there any rule of limitation to bar a claim under the Mahomedan law ?
2. Is there any difference between a claim founded on a verbal, and one founded on a written engagement ?
3. Does informality in a deed vitiate a contract founded thereon ?
4. What is the rule with respect to priority of claims ?
5. Are contracts dissolved by the death of one of the contracting parties ?
6. What is the rule with respect to leases and partnerships ?
7. Are oaths administered to witnesses ?
8. What are the leading principles of the Mahomedan Law with respect to inadmissible evidence ?
9. When is the evidence of females, not corroborated by the testimony of males, admissible ?
10. When is hearsay evidence admissible ?
11. What is the rule with respect to variance ?
12. State the rule regarding the onus probandi ?
13. What particular special pleas may be advanced in a defence ?
14. Is there any provision in the Mahomedan Law regarding estoppels ?
15. What is the rule when the plaintiff has no evidence ?
16. When evidence is adduced on both sides, to which side should preference in general, be awarded ?
17. To what side should preference be given when judging of evidence in a dispute, between a lessor and a lessee, or between husband and wife regarding dower ?
18. Can a judgment be passed exparte ?
19. When a case is referred to arbitration, is it necessary that the decision of the arbitrators should be unanimous ?
20. Can an acknowledgment be retracted ?
21. Does a bare assertion of an heir disclaiming right to share in property, amount to relinquishment,—and does such a disclaimer bar a subsequent claim ?
22. Upon which of the parties does the onus probandi lie in the following cases of dispute, between a widow and other heirs of her husband ?

1st. Possession of property which the widow denies.

2nd. Disputed value of property acknowledged by the widow to have been received.

3rd. Property alleged by the heirs to have been given in satisfaction of dower ;—and by the widow, as a gratuitous gift.

4th. The right to household property.

GLOSSARY.

A.

Aimah, (A. ايمه) Learned or religious men. Allowances to religious and other persons of the Muhammadân persuasion. Land given as a reward or favor by the King at a very low rent. Charity lands.

Aimahdar, (P. ايمه‌دار) A learned or religious person who holds or enjoys charitable donations.

Aimah Mauza, (A. ايمه موضع) A village given as a charitable allowance to learned or religious persons.

Akbar-ur-rai, (A. اكبرالراي) Convincing. Strong presumption.

Akila, (A. عاقله) One who is subject to pay Diyat or the fine of blood.

Akubat, (A. عقوبة) Punishment. Chastisement.

Altamgha, (Tur. آلتمغا) A royal grant in perpetuity. Perpetual tenure. An heritable Jagir in perpetuity.

Altamghadar, (Tur. آلتمغا دار) A holder of an Altamgha.

Altamghâ Inaam, (Tur. آلتمغا انعام) A royal grant in perpetuity of land free of rent.

Amanat Nameh, (P. امانت نامه) A deed of trust.

Asbah, (A. عصبة) Kindred relations, Agnate relatives.

B.

Ba Farzandan, (P. با فرزندان) A grant to a person of lands to descend to his children.

Bait-ul-Mal, (A. بيت المال) The royal treasury.

Barai Khur-o-Posh, (P. براي خور و پوش) Maintenance. Allowance for food and clothing.

Bay-bil-wafa, (A. بيع بالو فا) A mortgage. A conditional sale.

Bay Mokasa, (A. بيع مقايضه) Barter. A deed of sale in satisfaction of dower.

Bay Taljiah, (P. بيع تلجيه) A fictitious sale made to serve a temporary purpose.

Baz Nameh, (P. باز نامه) A deed of relinquishment.

Benami, (P. بي نامي) A sale or purchase made in the name of some one other than the actual vendor or purchaser.

Butwara, (H. بٹوارا) Shares. A formal division of property into parts.

C.

Champakali, (H. چمپا كلي) A necklace.

Chila, (H. چيلا) A slave brought up in the house; a favorite slave; a pupil.

D.

Dirhem, (A. درهم) A silver coin, of which from twenty to twenty-five have, at different times passed current for a dinar (nearly equal to a ducat or a sequin, about nine shillings.)

Diyat, (A. ديت) The law of retaliation. An expiatory mulct for murder.

F.

Fakir, (A. فقير) A poor man, a mendicant. A Musulman beggar.

Faraiz, (A. فرائض) The legal knowledge of dividing inheritance according to the Mahomedan law.

Farikh khatt, (P. فاريخ خط) A written release.

Farzi, (A. فرضي) A purchase in a fictitious name. Synonymous with Benami.

Fasid, (A. فاسد) Vicious. Imperfect. Invalid.

Fasli or Fusli, (P. فصلي) What relates to the seasons: the harvest year.

Foujdari, (P. فوجداري) The office or jurisdiction of a criminal Magistrate or Judge.

Futawa, (A. فتاوي) Plural of Futwa *q. v.*

Futwa, (A. فتوي) A judicial decree, sentence, or judgment, particularly when delivered by a Mufti.

G.

Gaddi, (H. گدي) A pillow; but used as a throne. The seat of sovereignty or chiefship.

Gaddi nishin, (H گدي نشين) Sitting on a pillow. A Sovereign or Chief. He who sits on the gaddi. A superintendent of a religious endowment.

Ghalib-uz-zan, (A. غالب الظن) Strong presumption.

Ghazb, (A. غضب) Violence. Force.

H.

Hadd, (A. حد) Punishment. Chastisement especially by the infliction of lashes.

Hakim, (A. حاكم) A Governor. A Judge, an Arbitrator, a Magistrate.

Hakk, (A. حق) A just claim, right or due.

Hakk dar, (P. حقدار) One who possesses a right.

Halakat, (A. هلاكت) Homicide.

Hali, (H. حالي) A bondsman, one serving as a laborer in payment of a debt, until the debt is discharged.

Haram, (A. حرم) Being forbidden. A concubine. The woman's apartment.

Hazir zamin, (A. حاضر ضامن) Surety or bail for appearance.

Hazl, (A. هزل) Joking. Jesting.

Hibeh-ba-shart-ul-Iwuz, (A. هبه بشرط العوض) A gift on stipulation or promise of a consideration. Hibeh-ba-shart-ul-Iwuz is said to resemble a sale in the first stage only; that is, before the consideration for which the gift is made has been received, and the seizin of the donor and donee is therefore a requisite condition.

Hibeh-bil-Iwuz, (A. هبه بالعوض) A gift for a consideration. Hibeh-bil-Iwuz is said to resemble a sale in all its properties; and the same conditions attach to it, and the mutual seizin of the donee is not, in all cases, necessary.

Hibeh Nameh, (P. هبه نامه) A deed of gift.

Hissah Nameh, (P. حصه نامه) A deed of partition.

Hukumat-ul-adl, (A. حکومت العدل) An award of equity. An arbitrary atonement.

Hundi, (H. هندي) A bill of exchange.

Huzuri, (P. حضوري) Relating to the presence, or chief station of authority.

I.

Ibraa, (A. ابراء) Discharge, remission.

Ijab. (A. اجاب) A verbal offer.

Ijab-i-kabul, (P. اجاب قبول) Acceptance of a verbal gift.

Ikbal Daawa, (A. اقبال دعوي) Confession of judgment. An acknowledgment of want of right in the subject matter of a suit.

Iktyar Nameh, (P. اختيارنامه) A voluntary deed.

Ikrah, (A. اكراه) Homicide by compulsion.

Ikrar Nameh, (P. اقرارنامه) A written acknowledgment.

Inaam, (A. انعام) Present, gratuity. Inaams are grants of land free of rent; or assignments of the Government share

of the produce of a portion of land for the support of religious establishments and priests, and for charitable purposes. Also to revenue officers, and the public servants of a village.

Inaamdar, (P. انعامدار) Holder of any thing as a favor. A person in the possession of rent free, or favorably rented lands: or in the enjoyment, under the assignment thereof, of the Government dues of a particular portion of land, granted from charity, &c.

Inaam Izafat, (A. انعام اضافت) A stipendiary grant. Lands or the produce thereof, granted free from tax in remuneration for services rendered.

Inaam Sanad, (A. انعام سند) A Patent or written authority for holding Inaam lands.

Intifa, (A. انتفاع) Utility. Profit. Advantage.

Ism Farzi, (A. اسم فرضي) One in whose name purchase is made, the name of the real purchaser not appearing in the transaction.

Istihsan, (A. استحسان) Approving. Taking or considering a thing as a favor.

Istimrardar, (P. استمراردار) The holder of a grant in perpetuity.

Istimrari, (P. استمراري) Perpetual, continuous.

J.

Jagir, (P. جاگير) An assignment of the Government revenue on a tract of land to families, individuals, or public officers.

Jagirdar, (P. جاگيردار) One who holds a Jagir.

Janishin, (P. جانشين) A lieutenant, a successor.

Jhutha Pugla, (H. جهوتهاپگلا) A fictitious robbery.

Julus, (A. جلوس) The beginning of a reign. The accession to the throne.

K.

Kabin nameh, (P. كبين نامه) A dowry deed. A marriage settlement.

Kabul, (A. قبول) Consenting. Acceptation. Acknowledgment.

Kabuliyat, (A. قبوليت) An engagement or agreement in writing. The counterpart of a revenue lease.

Kadimi, (P. قديمي) A sect of fire worshippers.

Karar Nameh, (P. قرارنامه) A deed of agreement.

Katl-i-Kaim Makam Ba Khataa, (P. قتل قايم مقام بخطاء) Involuntary Homicide.

Katl-i-khataa, (P. قتل خطا) Homicide by an erroneous act, or by error in the intention.

Katl-i-umd, (P. قتل عمد) Murder.

Kazi, (A. قاضي) A Judge, Civil, Criminal, and Ecclesiastical among the Mahomedans.

Kazi-ul-kozat, (A. قاضي القضاة) The Chief Kazi.

Khataa, (A. خطاء) Accidental.

Khatib, (A. خطيب) A preacher. A reader of prayers in a mosque.

Khatt Kubala, (A. خط قباله) A writing preparatory to a deed. In Bengal a deed of conditional sale, the same as Bay-bil-wafa, *q. v.*

Khotbah, (A. خطبه) An oration delivered every Friday after the forenoon service in the principal mosques, in praise of God, Mahomed, and his descendants, and prayers for the ruling power.

Kirah, (A. كره) Homicide by compulsion.

Kisas, (A. قصاص) Retaliation.

Kubala, (A. قباله) A contract or deed. A written agreement.

Kurwah, (H, كڑوا) A conductor of pilgrims.

L.

Ladavi, (A. لادعوي) A deed of relinquishment. A release or acquittance. Without claim.

Luktah, (A. لقطه) Property which a person finds lying on the ground, and takes away for the purpose of preserving it in trust. A stray. A trove.

M.

Madad-i-maash, (P. مدد معاش) Aid for subsistence. An article in the rent roll called Tamar Jama, consisting of allotments of lands, as a subsistence to learned or religious men; an item of the *Mazkurat*, and a branch of *Aimah* grants.

Mahall, (A. محال) Places, districts, departments. Places or sources of revenue particularly of a territorial nature.

Mahall sarai, (P. محالسراي) The women's apartments.

Mahr, (A. مهر) A marriage portion or gift settled on a wife before marriage. Dower.

Mahr nameh, (P. مهرنامه) A deed of settlement of dower.

Mahr Maujjil, (A. مهر موجل) Exigible dower.

Mahr Muwajjil, (A. مهر موجّل) Deferred or in-exigible dower.

Mahram, (A. محرم) Any one to whom the women's apartments are open.

Makandari, (P. مكاندارى) The ownership of a place. The office of Superintendent of a Mosque.

Mal, (A. مال) Wealth, property. Revenue, rent derivable from land.

Malik, (A. مالك) Master, proprietor, owner.

Malzamin, (A. مالضامن) Bondsman for the discharge of a debt, or payment of rent.

Malzamini, (P. مالضامني) Written security for the due payment of a debt or revenue.

Mamluk, (A. مملوك) A purchased slave or captive.
Mangni, (H. منگني) Betrothing. Asking in marriage.
Masjid, (A. مسجد) A mosque. A place of worship.
Maujjil, (A. موجل) Exigible dower payable on marriage.
Maulavi, (A. مولوي) A learned and religious man. The law officer appointed in the courts for the interpretation of the Mahomedan law.

Mauza, (A. موضع) A place, a village.
Mehtur, (P. مهتر) A prince. A head man. A menial servant of the lowest description.

Mihnutanah, (P. محنتانه) Service money. Payment for work done.

Milkiyat, (A. ملكية) Property. Proprietary right.
Mogullai, (P. مغلاي) Government dues.
Moonsiff, (A. منصف) A Judge-advocate, an Arbiter. A Judge in the Company's Courts having a limited jurisdiction.
Muchalkah, (Tur. مچلكه) A solemn engagement or declaration in writing. A counterpart of a deed or lease.
Mufti, (A. مفتي) A Mahomedan law officer.

Muharram, (A. محرّم) The name of the first month of the Mahomedan year. The mourning festival observed in that month by the Musalmans of India, in rememberance of Hasan and Husain, the grandsons of the Prophet.

Mukhtar, (A. مختار) An agent, a steward.
Mukhtarkar, (P. مختاركار) The same as Muktar.
Mukhtar nameh, (P. مختار نامه) A power of attorney.
Multakit, (A. ملتقط) One who falls unexpectedly on any thing not sought for.

Munshi, (A. منشي) A letter writer. A secretary, a teacher of languages.

Mustamin, (A. مستامن) A person residing in a foreign country under a protection procured from the ruling power.

Mutawalli, (A. متولي) The Superintendent or Treasurer of a mosque. An administrator or procurator of any religious or charitable foundation.

Muwajjal, (A. موجّل) Payment deferred.

N.

Naib, (A. نايب) A vicegerent. A deputy.

Naib-i-Nazim, (P. نائب ناظم) Deputy of the Nazim or governor.

Nazim, (A. ناظم) The Chief officer of a province. A Viceroy or Governor.

Nazir, (A. ناظر) A supervisor or Inspector. The Executive officer of a Court.

Nazr, (A. نذر) An offering. A present made to a superior.

Nazraneh, (P. نذرانه) Any thing given as a present, particularly as an acknowledgment for a grant of lands, public offices and the like.

Nikah, (A. نكاح) Marriage. In the language of the law this term implies a particular contract for the purpose of legalizing generation; a betrothal. Vide Digest Tit. Mar. Note to Case 18.

P.

Pan, (H. پان) Betel-nut.

Pan batta, (H. پان بتّا) A customary present of Pan made to, and exacted by certain parties on particular ceremonial occasions.

Pardah, (P. پرده) A Veil. A curtain. Applied to females it signifies such as may not lawfully be exposed to the gaze of strange men.

Pardah nishin. (P. پرده نشین) Sitting behind the curtain. Vide Purdah.

Perwaneh, (P. پروانه) A royal patent. A. pass, a permit.

Peshkash, (P. پیشکش) A present, particularly to Government, in consideration of an appointment, or as an acknowledgment for any tenure. Tribute, fine, quit rent, advance on the stipulated revenues. The first prints of an appointment or grant of land.

Pirmurshid, (P. پیرمرشد) An aged instructor. A family priest.

Pirotar, (H. پیروتار) Allowance to Mahomedan sages. A particular description of lands held rent free, or assignments of the Government dues from particular lands engaged by such persons.

R.

Radd, (A. رد) The return, in the Mahomedan law of inheritance. The residue.

Rafa nameh, (P. رفع نامه) A deed of relinquishment.

Raj, (H. راج) Government, sovereignty. A kingdom.

Rajgi, (P. راجگي) Sovereignty.

Rasmi, (P. رسمي) A sect of fire worshippers.

Rihn, (A. رهن) A pledge, a pawn.

Rishtahdari, (P. رشتهداري) Relationship.

Rubakari, (P. روبكاري) A form of instructions for proceeding in a particular business.

Rukah, (A. رقعه) A short letter or note. A note of hand.

Rusum, (A. رسوم) Customs, customary commissions, gratuities, fees, or perquisites.

S.

Sajjadeh nishin, (P. سجّاده نشین) Sitting on a praying carpet. The supervision of a religious endowment,

Salami, (A. سلامي) A free gift made by way of compliment or in return for a favour.

Sanad, (A. سند) A patent a charter or written authority for holding either land or office.

Sanad-i-Milkiyat-i-Istimrar, (P. سند ملكيت استمرار) A written authority for the permanent possession of lands or office.

Sarakah-i-Sagrar, (P. سرقه صغرار) A minor species of larceny without open violence.

Sarai, (P. سراي) A house. A palace. A seraglio. A building erected for the accommodation of travellers.

Sasun birt, (H. ساسن برت) A grant of revenue or any perquisite conveyed by deed for the maintenance of a person.

Sata, or Satakhat, (A. صتا يا صتاخط) A preparatory instrument in the nature of articles of agreement intended to be followed by the execution of a more formal contract.

Seth, (H. سيته) A chief of a sect or caste of tradesmen over whom he has the control.

Shadid, (A. شديد) Strong, vehement. Violent presumption.

Shafi khalit, (A. شافيع خليط) Neighbours by common tenancy. Partners.

Sheti Watan, (H. سيتي وطن) The hereditary fees and perquisites of a seth.

Shibeh-i-kawiy, (P. شبهه قوي) Violent presumption.

Shibeh-i-umd, (P. شبهه عمد) Culpable homicide.

Shikast Piwust, (P. شكست پيوست) Literally "broken and joined." Alluvial land properly so called.

Shirakat nameh, (P. شراكت نامه) A deed of partnership.

Shufaah, (A. شفعه) In the language of the law signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereunto. The right of pre-emption.

Siyasut, (A. سياسة) Exemplary punishment at the discretion of the Judge for offenders committing heinous and flagrant crimes.

Sulah nameh, (P. صلاح نامه) A writing of concord. A deed of compromise.

T.

Taidad, (A. تعداد) Number, computation. An extract from the Collector's register of lands.

Taksim nameh, (P. تقسيم نامه) A deed of division.

Talab-i-Muwasabat, (P. طلب مواشبة) Immediate demand, particularly as applied to the right of pre-emption.

Tamassuk, (A. تمسك) A bond or obligation in writing.

Tanakuz, (A. تناقض) Being discordant. Repugnancy.

Tankhah, (P. تنخواه) An assignment on lands, or order on the treasury for the payment of a stipend, or salary, or the like.

Tarikat, A. تركات) Things left after death, effects, inheritances, bequests.

Tashhir, (A. تشهير) Ignominious exposure. Ordering a criminal to be carried through the city as an example.

Tauliyat, (A. توليت) Transferring property. The Superintendency of Mosques and religious establishments.

Tauliyat nameh (P. توليت نامه) A Deed of transfer.

Tazir, (A. تعزير) An infliction of punishment by flaggellation or otherwise, at the discretion of the Judge, for any offence, whether of word or deed, not subject to a specific legal penalty.

Tehbazari, (P. تهبازاري) Ground rent of a stall in a market.

U.

Umd, (A. عمد) A wilful act. This word is used by the Maho-

medan Criminal lawyers in opposition to Khataa, accidental.

W.

Wakf, (A. وقف) An endowment. Property dedicated to pious uses.

Wakif, (A. وقيف) One who dedicates property to pious uses.

Warasat nameh, (P. وراشت نامه) A deed of acknowledgment of heirship.

Wasilat, (A. واصلات) The total collected under every description. Mesne profits.

Wasiyat nameh, (P. وصيت نامه) A last will A deed constituting heirs. A paper of administration.

Watan, (A. وطن Hereditary property. Village offices, which descend according to the laws of succession.

Watandar, (P. وطندار) A possessor of watan property.

Wazifah, (A. وظيفه) Lands assigned for the payment of a pension or stipend.

Wazifahdar, (P. وظيفه‌دار) A holder of Wazifah lands.

Z.

Zananeh, (P. زنانه) Apartments appropriated to women. A seraglio.

ZiFirash, (P. ذي فراش Bed-ridden.

Zi-hakk, (A. ذي حق) Allowances, rights, dues.

Zi-l-kadah, (A. ذي القعده) The penultimate month of the Mahomedan year.

Zual Ihram, (A. ذوالاحرام) Kindred in whose line of relation a female enters.

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☞ **The Author reserves to himself the right of translation of the Appendix.**

FINIS.